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Supreme Court, U.S.
FILED

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

VS.

ROBERT J. PELLETIER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that in civil rights actions against individual government officials, orders denying claims of qualified immunity on a defendant's motion to dismiss or motion for summary judgment are appealable final decisions under 28 U.S.C. § 1291. Since *Mitchell*, three Circuit Courts of Appeals have adopted — and three others have rejected — a rule that jurisdiction over an interlocutory immunity appeal exists only if the defendant has not previously appealed any immunity issue. Here, the Court of Appeals for the Ninth Circuit dismissed petitioner's appeal of a summary judgment order denying his qualified immunity claim solely because petitioner had previously appealed the denial of a motion to dismiss on immunity grounds. The case therefore presents the following question:

Whether the court of appeals lacks jurisdiction over a government official's interlocutory appeal of a summary judgment order denying a claim of qualified immunity solely because the official had previously appealed a denial of immunity at the motion to dismiss stage.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
A. Circuit Decisions Are In Conflict: Three Circuits Accept, And Three Refuse, Jurisdiction Over More than One Interlocutory Immunity Appeal	6
B. The One-Appeal Rule Enforced By Three Courts of Appeals Is Directly At Odds With *Mitchell v. Forsyth*	10
C. The One-Appeal Rule Is Inconsistent With Supreme Court Case Law On Qualified Immunity And On The Collateral Order Doctrine	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

	Page
Abel v. Miller, 904 F.2d 394 (7th Cir. 1990)	8
Anderson v. Creighton, 483 U.S. 635 (1987)	7
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	12
Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992)	5
Digital Equipment v. Desktop Direct, Inc., ___ U.S. ___, 114 S.Ct. 1992 (1994)	13-15
English v. Dyke, 23 F.3d 1086 (6th Cir. 1994)	8
Forsyth v. Kleindienst ("Forsyth I"), 599 F.2d 1203 (3d Cir. 1979)	10
Forsyth v. Kleindienst ("Forsyth II"), 700 F.2d 104 (3d Cir. 1983)	11
Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267 (3d Cir. 1984)	11
Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)	8
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6
Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir. 1988)	8, 9, 12
Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986)	8
Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992)	8
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2, 4, 6, 7-15
Murphy v. Morris, 849 F.2d 1101 (8th Cir. 1988)	8
Nelson v. Silverman, 999 F.2d 417 (9th Cir. 1993)	8, 13, 14
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	2
Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992)	2, 3, 4, 9

TABLE OF AUTHORITIES

CASES

Page

Siegert v. Gilley, 500 U.S. 226 (1991) 5
Sinclair v. Schriber, 834 F.2d 103 (6th Cir. 1987) ... 8
United States v. MacDonald, 435 U.S. 850 (1978) ... 13-15

Statutes

28 U.S.C. § 1254(1) 2, 4, 10
28 U.S.C. § 1291 ..... 2, 5, 10-15
28 U.S.C. § 2071 9

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JOHN W. BEHRENS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John W. Behrens respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit dismissing for lack of jurisdiction petitioner's interlocutory appeal of the district court's order denying qualified immunity.

OPINIONS BELOW

The order of the court of appeals for which a writ of certiorari is sought (Appendix, *infra,* 1a) is unreported. A prior and related opinion of the court of appeals in this case (App. 10a-33a) is reported at 968 F.2d 865. The opinions of the district court (App. 2a and 8a) are unreported.

JURISDICTION

The court of appeals entered its order dismissing petitioner's appeal on November 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Certiorari jurisdiction under § 1254(1) includes jurisdiction to review an order of the court of appeals dismissing an interlocutory immunity appeal for lack of jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

STATUTORY PROVISION INVOLVED

Petitioner's appeal was dismissed on the ground that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, as construed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Section 1291 states in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT

In 1988 respondent Robert J. Pelletier brought a civil rights action for damages against, among others, the Federal Home Loan Bank of San Francisco and its employee, petitioner John Behrens. The factual history of the case is described in some detail in the Ninth Circuit's decision on Behrens' earlier immunity appeal, *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992) (App. 10a-33a). Briefly, in the mid-1980's the Federal Home Loan Bank Board, the federal agency then responsible for regulating savings and loan associations, designated Behrens as the Bank Board's supervisory agent for certain thrifts. One of the thrifts placed under Behrens' supervision was Pioneer Savings, a federally insured institution. When the Bank Board approved Pioneer's application for insurance of its accounts in 1984, it imposed certain conditions on Pioneer, including the requirement that Pioneer hire a

managing officer subject to approval by the Bank Board. Pioneer provisionally named Pelletier managing officer in 1985, then sought Bank Board approval. As Pioneer's supervisory agent, Behrens notified Pioneer by letter dated May 8, 1986 that Pelletier's employment could not be approved at that time because Pelletier was under regulatory investigation in connection with the failure of another thrift. The ensuing lawsuit claimed that Behrens was responsible for Pelletier's being summarily fired by Pioneer, and for Pelletier's alleged inability thereafter to obtain other employment in the savings and loan industry. The causes of action against Behrens are pleaded as constitutional and common law torts.

Pelletier's constitutional tort claims against Behrens fall into two groups involving different factual predicates. One group is based on the May 1986 letter from Behrens to Pioneer which Pelletier contends resulted in termination of his employment; the other involves what the Ninth Circuit characterized as "nebulous theories of conspiracy" to prevent Pelletier from obtaining a similar position elsewhere. The district court dismissed the job-termination claims as time-barred. Behrens moved to dismiss the remaining constitutional tort claims, all premised on the vague conspiracy theories, on the ground that he was entitled to qualified immunity. When the district court denied the motion to dismiss, Behrens filed the interlocutory appeal that produced the 1992 *Pelletier* decision. App. 11a-16a.[1]

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[1]In the same appeal Behrens also sought review of the district court's refusal to substitute the United States as defendant in place of Behrens on Pelletier's common law tort claims. Reversing the district court on that issue, the court of appeals ruled that substitution was mandatory under the Federal Employees Liability Reform and Tort Compensation Act because all of Behrens' alleged activities, including the May 1986 letter, were within the scope of his employment as a federal official. App. 32a.

On the initial appeal, the Ninth Circuit conceded that under *Mitchell v. Forsyth*, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final orders. It nonetheless announced, for the first time, a rule designed to restrict substantially the scope of *Mitchell* appeal rights. A defendant who exercised his right to appeal an adverse dismissal decision did so "at his peril," said the panel, because the court of appeals would refuse to hear any subsequent appeal at the summary judgment stage. App. 17a-19a. As a result, Behrens' first pre-trial appeal, made the vehicle for a new "one immunity appeal" rule in the Ninth Circuit, abruptly became his last.

The court then reviewed the denial of Behrens' motion to dismiss the conspiracy-based claims on immunity grounds. It concluded that Pelletier's allegations were adequate for pleading purposes, but "would be insufficient to survive a motion for summary judgment" under the most relaxed evidentiary standard. App. 22a-23a. The effect of the new one-appeal rule, however, was to insulate a later summary judgment decision if the district court chose not to follow the Ninth Circuit's explicit guidance. Further, the panel volunteered in a footnote its belief that the district court had applied the wrong statute of limitations in dismissing the job-termination claims against Behrens. Although the dismissal of those claims had not been appealed, the court's *sua sponte* observation effectively revived and reinstated them. App. 15a, n.6. Thus, the job-termination claims — which were not included in the appeal before the court, and had never been the subject of an immunity determination — sprang back to life in appeal-proof form as a result of the newly created second-appeal bar. The panel suggested, how-

ever, that summary judgment should easily dispose of those claims as well.[2]

Litigation resumed, and after submitting to full discovery Behrens made the summary judgment motion the Ninth Circuit had indicated should resolve the immunity issues in his favor. In September 1994, without oral argument or opinion, the district judge denied Behrens' summary judgment motion as to all claims. App. 5a, 6a. Behrens filed a timely notice of appeal under 28 U.S.C. § 1291. On motion of respondent Pelletier the district court entered an order declaring the appeal frivolous (App. 8a), apparently on the theory that the prior *Pelletier* decision was the law of the case.[3] Pelletier also moved in the Ninth Circuit to dismiss Behrens' appeal for lack of jurisdiction, again citing the earlier appellate decision as dispositive. On November 17, 1994, a Ninth Circuit motions panel dismissed, solely on the ground that the appeal was a second one and the court of appeals therefore lacked jurisdiction under its single immunity appeal rule. App. 1a. In the same order, the court of appeals denied a stay pending application for writ of certiorari.[4]

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[2]The court noted that the Ninth Circuit had never decided whether private employment contingent on regulatory approval (like Pelletier's job with Pioneer) involves any constitutionally protected interest. App. 21a. In short, the revived job-termination claims alleged no violation of "a clearly established constitutional right" — a ground for summary judgment on qualified immunity. *Siegert v. Gilley*, 500 U.S 226 (1991).

[3]Ninth Circuit case law permits the district court to certify in writing that an interlocutory immunity appeal is "frivolous or waived." The effect of such certification is to create dual jurisdiction in the trial and appellate courts, permitting the case to proceed toward trial while the appeal is pending unless the court of appeals issues its own affirmative stay. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992).

[4]Behrens has filed concurrently with this petition an application for a stay of the trial now set to commence on May 16, 1994. All defendants

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because this case presents an important question of federal appellate jurisdiction which affects virtually all government employees, state and federal, who become defendants in civil rights actions. The issue has been addressed by six of the United States Circuit Courts of Appeals, with three holding that jurisdiction is limited to one interlocutory appeal on immunity issues, and three declaring that *Mitchell v. Forsyth* permits two such appeals. Conflicting rules are not tolerable in view of this Court's emphasis on the need for rapid, consistent immunity determinations to minimize disruption of governmental processes. Further, the single-appeal rule applied in this case by the Ninth Circuit cannot be reconciled with either the specific holding in *Mitchell v. Forsyth*, or the importance that recent decisions of this Court have clearly and consistently afforded the immunity defense.

A. Circuit Decisions Are In Conflict: Three Circuits Accept, And Three Refuse, Jurisdiction Over More Than One Interlocutory Immunity Appeal

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court concluded that untenable civil rights actions against government employees should be terminated as rapidly as possible in order to minimize the "costs of subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary actions, and deterrence of able people from public service." *Id.* at 816. To facilitate pre-trial resolution, the Court stripped the qualified immunity defense available to such defendants of the subjective elements that commonly required jury determination, and

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have been dismissed except Behrens and the United States, which was substituted for Behrens as defendant on the common law tort claims. The stay application is addressed to Justice O'Connor, as Circuit Justice for the Ninth Circuit.

therefore a full trial of the case. The *Harlow* opinion stressed that since broad discovery and other pre-trial litigation burdens can be "peculiarly disruptive of effective government," a defendant who merited immunity was as much entitled to avoid those intrusions as he was entitled to protection from ultimate liability. *Id.* at 817-18 & n.29. Consistent with that strong policy statement, the Court decided three years later that an order denying qualified immunity is subject to immediate interlocutory appeal because the core of the defense, the right not to stand trial, is irretrievably lost if review is available only after a final verdict. Specifically, the *Mitchell* opinion held that "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets [the finality] requirements" of the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. at 527. The decision also identified at least two legal issues which, if resolved against a civil rights defendant, provide proper grounds for pre-trial appeal:

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Id. at 526-27, citations omitted; *see also Anderson v. Creighton*, 483 U.S. 635, 641, 646 n.6 (1987).

Six Circuit Courts of Appeals have considered whether *Mitchell* means what it clearly appears to say: that a civil rights defendant may take an interlocutory appeal of a district court's denial of a motion to dismiss on the ground of immunity, *and*, if necessary, appeal a subsequent adverse

summary judgment decision before trial as well. Three of the appellate courts have answered affirmatively; three have said no. The court most recently stating a position is the Third Circuit: "[I]t is generally understood that *Mitchell* contemplates appeals from denials of immunity at either or both of these stages in civil rights proceedings." *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) (dictum); *accord, Murphy v. Morris*, 849 F.2d 1101, 1103-04 (8th Cir. 1988) (rejecting appeal limit on the ground that it undercuts the value of the immunity defense); *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994) (first appeal does not preclude second); *Sinclair v. Schriber*, 834 F.2d 103, 104-05 (6th Cir. 1987) (subject to collateral order requirements, *Bivens* defendant has "two bites out of the appellate apple, at the pleading and at the discovery stage"); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) (there may be "not one but two interlocutory appeals" on immunity defense in civil rights action).

The Ninth, First and Seventh Circuits, on the other hand, assert that while *Mitchell v. Forsyth* offers "several *opportunities* for immediate appeal," a defendant may use only one of those opportunities. *Pelletier v. FHLBSF, supra*, 968 F.2d at 870-71 (emphasis in original); *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993) (rule is absolute and categorical, "applicable to all second appeals"); *Abel v. Miller*, 904 F.2d 394, 395-96 (7th Cir. 1990) ("*Mitchell* does not contemplate sequential appeals"); *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-08 (1st Cir. 1988) ("both motions should be resolved prior to any interlocutory appeal").[5]

Resolution of the issue by this Court is essential. Whether a governmental official defending a civil rights suit is enti-

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[5]Before it reversed directions in *Pelletier*, the Ninth Circuit had indicated that it would adopt the two-appeal theory. *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991).

tled to one pre-trial immunity appeal or two significantly affects the utility of the immunity defense, and therefore the policy objectives the defense rests upon. A one-appeal rule effectively halves the reach of the immunity umbrella. As a practical matter, it compels a defendant to accept an erroneous denial of his motion to dismiss at the pleading stage, to submit to unwarranted discovery and bear the unwarranted interference of protracted litigation, in order to insure appellate access if the district court repeats its error at the summary judgment stage. Indeed, the First Circuit candidly acknowledges that a single appeal rule is a judicially compelled waiver of appellate rights:

> [I]f [a defendant whose motion to dismiss on the ground of immunity has been denied] wishes to take an immediate interlocutory appeal, [he must] state unequivocally — as a condition thereto — that he waives any right to file additional *interlocutory* appeals from any subsequent prejudgment rulings relative to immunity, absolute or qualified.

Kaiter v. Town of Boxford, 836 F.2d at 708 (emphasis in original).[6]

The effectiveness of the federal qualified immunity defense should not and cannot depend on whether a government official is sued in Los Angeles or in Philadelphia. Petitioner Behrens respectfully contends that in view of the division in circuit-level case law on this substantial jurisdictional issue, certiorari should be granted.

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[6]Framed in those bald terms, the one-appeal limitation strongly resembles a court-fashioned rule of appellate procedure imposed without the process prescribed by 28 U.S.C. § 2071. The Ninth Circuit achieves the same forced waiver effect by daring a defendant to "appeal[ ] at his peril" in the earlier stages of the litigation. *Pelletier v. FHLBSF*, 968 F.2d at 871.

B. The One-Appeal Rule Enforced By Three Courts of Appeals Is Directly At Odds With *Mitchell v. Forsyth*

The Ninth Circuit dismissed petitioner Behrens' appeal on the ground that the court of appeals lacks jurisdiction over all second immunity appeals. *Nelson v. Silverman*, 999 F.2d at 419. That position cannot be reconciled with this Court's decision in *Mitchell v. Forsyth*. *Mitchell* itself involved a second pre-trial immunity appeal, which the Third Circuit heard as an interlocutory appeal under § 1291. This Court, whose certiorari jurisdiction over the case under 28 U.S.C. § 1254(1) was contingent upon the existence of proper appellate jurisdiction below, heard and decided the case without jurisdictional misgivings.

The *Mitchell* case had its origin in a civil rights suit against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. Mitchell moved for summary judgment on defenses of both absolute and qualified immunity. The district court ruled that as a matter of law Mitchell was not entitled to absolute immunity, and denied summary judgment on the qualified immunity claim based on a finding of disputed facts. Mitchell appealed. *Forsyth v. Kleindienst ("Forsyth I")*, 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell v. Forsyth*, 472 U.S. at 516. The Third Circuit dismissed the appeal as to qualified immunity on the ground that it was not an appealable order, but decided the absolute immunity issue. Concluding that the factual record was incomplete, the court of appeals outlined the proper absolute immunity test and remanded to the district court. *Forsyth I*, 599 F.2d at 1217. That was the first Mitchell appeal.

In the trial court once more, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues and granted Forsyth's cross-motion for summary judgment on liability, leaving punitive damages issues to be

tried. *Mitchell v. Forsyth*, 472 U.S. at 516-17. Mitchell "*again appealed*, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity." *Id.* at 517 (emphasis added).

The second interlocutory appeal was referred initially to a Third Circuit motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst ("Forsyth II")*, 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction under § 1291, Judge Sloviter recorded a strong dissent based primarily on the posture of the appeal as a second one: "I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Forsyth II*, 700 F.2d at 107, 109 (emphasis added). The Third Circuit panel which subsequently issued an opinion on the merits also noted expressly that it was a "second interlocutory appeal from a denial of both absolute and qualified immunity." *Forsyth v. Kleindienst ("Forsyth III")*, 729 F.2d 267, 268 (3d Cir. 1984). The *Forsyth III* decision then went to this Court on writ of certiorari under the name *Mitchell v. Forsyth*. *Mitchell*, 472 U.S. at 518-19.

This Court was aware that in *Mitchell* it was reviewing a second interlocutory appeal, specifically calling attention to Judge Sloviter's argument that the appeal was "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Id.* at 517, 518 n.3. In sum, the second-appeal issue was recognized by and squarely before the Supreme Court in *Mitchell*. Had it presented a jurisdictional impediment, this Court would have been obliged to note defective jurisdiction in the court of appeals:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . "And if the record discloses that the lower court was without

> jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (brackets in original, citations omitted). The Court was untroubled about its jurisdiction over Mitchell's second immunity appeal, and made no suggestion, in its analysis of pre-trial appealability, that prior appellate access was or should be a limiting consideration on the issue of jurisdiction.[7]

Petitioner Behrens respectfully contends that certiorari should be granted because the *Mitchell* decision itself refutes the Ninth Circuit's determination that no jurisdiction exists under § 1291 to hear any second immunity appeal.

C. The One-Appeal Rule Is Inconsistent With Supreme Court Case Law On Qualified Immunity And On The Collateral Order Doctrine

The 1988 First Circuit decision that originated the one-appeal rule acknowledged that "*Mitchell*, read literally, permits two interlocutory appeals on immunity." *Kaiter v. Town of Boxford*, 836 F.2d at 707. However, the First Circuit and the two other benches that have followed its

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[7]The fact that the appeal actually heard twice by the Third Circuit was an absolute immunity appeal is not a viable distinction. Both absolute and qualified immunity share the same policy rationale, and both are intended to shield against trial and litigation burdens as well as liability. *Mitchell*, 472 U.S. at 525-26. The point of *Mitchell* was that identical appeal rules apply to both. *Id.* at 526-27; see *Kaiter v. Town of Boxford*, 836 F.2d at 707 (absolute and qualified immunity are not only subject to the same appeal rules, but must both be raised in the same single appeal).

lead have taken the position that notwithstanding the literal words of *Mitchell*, a single-appeal limitation is justified by the judicial economies it achieves. The rationale for limiting immunity claimants to a single pre-trial appeal, as succinctly stated by the Ninth Circuit, is a straightforward cost-benefit analysis that offers only the briefest nod to the importance of the immunity right being circumscribed:

> [T]hese appeals ... exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets.... [T]he price is worth paying once but not repeatedly.

Nelson v. Silverman, 999 F.2d at 418; *see Kaiter v. Town of Boxford*, 836 F.2d at 707 (purpose of limitation is to avoid "burden[ing] the appellate system and prolong[ing] the pretrial process").

Based on that analysis, the single-appeal circuits decline jurisdiction over all second interlocutory appeals, as a class. *E.g., Nelson v. Silverman*, 999 F.2d at 419. A few months ago this Court confirmed in *Digital Equipment v. Desktop Direct, Inc.*, ____ U.S. ____, 114 S.Ct. 1992 (1994), that finality determinations indeed should be based on types or categories of claims, not particular facts. *Id.* at 1996 ("appealability under § 1291 is to be determined for the entire category to which a claim belongs"); see also *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) (Congress intended the concept of finality in § 1291 to be "defined in terms of categories"). In the immunity context, this Court has expressly defined the class of decisions that are final for purposes of appellate jurisdiction under § 1291: "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity." *Mitchell v. Forsyth*, 472

U.S. at 527. The Ninth Circuit, however, reshuffles summary judgment appeals, if they follow a prior dismissal appeal, into a separate category solely on the basis of perceived "additional expense and delay [to] the plaintiff and inconvenience [to] the trial court." *Nelson v. Silverman*, 999 F.2d at 419. That process flouts not only the *Mitchell* holding but the principle recently underscored in *Digital Equipment* that jurisdictional categories depend on the right at stake, not on expense or housekeeping considerations.

The appellant in *Digital Equipment*, a defendant in the underlying lawsuit, sought interlocutory review of an order denying a motion to dismiss the suit. The issue in the case was whether the *Mitchell* holding that interlocutory appeal rights are necessary to preserve the "right not to stand trial" inherent in qualified immunity extends to a contractual trial exemption derived from a settlement agreement. Appellant argued that an order denying enforcement of a contract-based exemption from trial is indistinguishable, in its effect on litigants and the litigation process, from denial of a constitutional or policy-based exemption such as qualified immunity. Therefore, appellant reasoned, an order refusing to enforce a dismissal provision in a contract must also be treated as final for purposes of appellate jurisdiction.

This Court rejected the analogy precisely because the *jurisdictional category* delineated in *Mitchell* was qualified immunity appeals, not appeals from orders that wrongfully refuse to terminate litigation before trial. *Id.* at 1997-2000. The Court explained that "availability of collateral order appeal must be determined at a higher level of generality" than merely the effect the presence or absence of an appeal right has on the litigation process. *Id.* at 2000-01. The appealability of qualified immunity claims rests on immunity's "good pedigree in public law" and its foundation in public policy rather than efficient litigation management or

judicial economy. *Id.* at 2000. In contrast, trial immunities arising from private contractual agreements lack that pedigree. They do not as a category rise to the level of importance needed for recognition under § 1291, regardless of the effects they may share with the qualified immunity defense. *Id.* at 2001. "The substance of the rights entailed . . . is dispositive." *Id.* at 2001 (internal quotation marks omitted); see also *U.S. v. MacDonald, supra*, 435 U.S. at 860 n.7.

By emphasizing that jurisdictional categories are properly determined at the level of the right involved, not the level of courtroom impact, the *Digital Equipment* opinion confirms that *Mitchell* indeed meant what it said: denial of immunity is immediately appealable at the motion to dismiss stage *and again* at the summary judgment stage because immunity rights *as a class* are discrete enough, and jurisprudentially important enough, to merit the protection of interlocutory appellate review.

In sum, the substance of the right entailed in petitioner Behrens' appeal of an erroneous summary judgment order — his entitlement to qualified immunity — is not altered simply because he previously appealed an order denying dismissal. To the extent plaintiffs' costs and court calendars are pertinent to appealability at all, the Ninth Circuit's analysis inappropriately reweighs policy factors the Supreme Court has already considered and ranked below qualified immunity. The effect of the single immunity appeal rule is to subordinate the immunity entitlement to perceived cost and docket control considerations, thus restriking the policy balance achieved by this Court at a significantly lower level than Supreme Court case law indicates is appropriate for qualified immunity claims.

CONCLUSION

Petitioner respectfully requests that certiorari be granted to resolve the split in the decisions of the courts of appeals on this jurisdictional issue by disapproving the Ninth Circuit's rule limiting civil rights defendants to a single interlocutory immunity appeal.

Date: January 19, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,
Plaintiff-Appellee,

vs.

FEDERAL HOME LOAN BANK OF
San Francisco, *et al.*,
Defendants,
JOHN W. BEHRENS,
Defendant-Appellant.

No. 94-56507
DC# CV-89-969-RMT
Central California

ORDER

FILED
November 17, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: WALLACE, Chief Judge, GOODWIN and NORRIS, Circuit Judges

The motion to dismiss this appeal for lack of jurisdiction is granted. See *Nelson v. Silverman*, 999 F.2d 417, 418-19 (9th Cir. 1993). The motion to stay trial proceedings pending this court's disposition of the motion to dismiss is denied as moot. The motion to stay trial pending the filing of a petition for certiorari to the United States Supreme Court is denied. The request for sanctions is denied.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Defendants.

No. CV 89-0969-RMT(Tx)

ORDER RE MOTIONS TO EXTEND DISCOVERY CUTOFF, MODIFY, RECONSIDER, AND STRIKE, AND FOR SUMMARY JUDGMENT AND CLARIFICATION

FILED
September 6, 1994
Clerk, U.S. District Court
Central District of California

ENTERED
September 7, 1994
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the following motions:

1. Motion by plaintiff to modify this court's order of October 6, 1989[1] to the extent it dismissed the *Bivens* claims as against defendants John W. Behrens ("Behrens") and the Federal Home Loan Bank of San Francisco ("FHLB-SF");

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[1]The motion refers to the order of October 6, 1991. However, the correct date of filing of the order is October 6, 1989.

2. Motion by defendant Office of Thrift Supervision ("OTS") for reconsideration and vacation of this court's order of August 10, 1990, which substituted OTS for FHLB-SF;

3. Motion by defendant OTS to strike jury demand;

4. Motion by defendant OTS to strike plaintiff's demand for punitive damages;

5. Motion by defendant Behrens for summary judgment;

6. Motion by defendant OTS for summary judgment;

7. Motion by Federal Deposit Insurance Corporation ("FDIC") for judgment on the pleadings as to plaintiff's claims for violation of the Privacy Act and interference with contractual relations and inducing breach of contract, which claims were severed from CV 86-6780-RMT and CV 88-651-RMT and consolidated herein; and

8. Motion by FDIC and defendants OTS, Behrens and the United States of America for leave to take depositions and for clarification of this court's order of March 3, 1994.

The court having considered the pleadings and other documents filed herein has determined as follows:

1. Plaintiff's *Bivens* claims should be reinstated as against defendant Behrens, since the applicable statute of limitations is three, rather than one, year;

2. Plaintiff's *Bivens* claims should not be reinstated as against defendant FHLB-SF, since said defendant is not a government actor and, therefore, is not liable under a *Bivens* claim;

3. As to the *Bivens* and Administrative Procedure Act claims, the action challenged by plaintiff is the letter written by defendant Behrens suggesting that plaintiff "step aside from the management" of Pioneer Savings and recommending that the board of directors "initiate a search for a

new managing officer without delay." Since defendant Behrens did not have the authority to issue said letter, and because the Federal Home Loan Bank Board ("FHLBB") *cannot* "be held liable for the exercise of 'authority' it never delegated or authorized in any way," (*Saratoga S & L v. Federal Home Loan Bank*, 724 F.Supp. 683 (N.D.Cal. 1989)), issuance of the letter by defendant Behrens should not be considered "agency action," as that term is used in the Administrative Procedure Act. As such, summary judgment should be granted in favor of all defendants on the third claim for relief for violation of the Administrative Procedure Act.

4. Defendant Behrens' authority to monitor conditions imposed by the FHLBB derived exclusively from the regulatory authority of the FHLBB. Although the FHLB-SF was the employer of defendant Behrens, the bank was not charged with any examination or oversight of the federally insured banks in its district. The issuance of the letter by defendant Behrens was not a function " 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the [FHLB-SF].' " *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 876 (9th Cir. 1992), *quoting Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 963, 968 (1986), *quoting Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 619 (1975). As such, the FHLB-SF should not be vicariously liable for the issuance of the letter by defendant Behrens. Consequently, summary judgment should be granted in favor of defendant FHLB-SF, or OTS as substituted for FHLB-SF, on the fifth claim for interference with contractual relations and inducing breach of contract, the sixth claim for intentional infliction of emotional distress, the seventh claim for negligent infliction of emotional distress and the eighth claim for negligence;

5. This court's order of August 10, 1990, which substituted OTS for FHLB-SF was incorrect and should be

vacated. However, OTS as substituted for FHLB-SF or FHLB-SF is entitled to summary judgment on the third, fifth, sixth, seventh and eighth claims for relief;

6. Material issues of fact remain as to defendant Behrens on the *Bivens* claims.

7. Plaintiff does not oppose the motion by FDIC to the extent it seeks judgment on the claim for interference with contractual relations and inducing breach of contract;

8. The motion by FDIC for judgment as to the claim for violation of the Privacy Act should be, and is hereby, deemed to be a motion for summary judgment. For the same reasons this court granted summary judgment on the Privacy Act claim in favor of defendant United States of America and OTS by order filed January 30, 1992, and entered January 31, 1992, summary judgment should have also been granted in favor of FDIC;

9. Although defendants have already had adequate opportunity to complete depositions as to plaintiff's fact witnesses, defendants should be provided with the opportunity to depose plaintiff's expert witnesses; and

10. Because plaintiff's claim for negligent infliction of emotional distress is subsumed under his claim for negligence, the seventh claim for negligent infliction of emotional distress should be dismissed.

Accordingly,

IT IS ORDERED as follows:

1. This court's order of October 6, 1989, to the extent it dismissed the *Bivens* claims as against defendant Behrens, is vacated and said claims as against defendant Behrens are hereby reinstated; the motion to the extent it seeks reinstatement of the Bivens claims as against defendant FHLB-SF is denied.

2. Summary judgment is granted in favor of all defendants on plaintiff's third claim for violation of the Administrative Procedure Act.

3. Summary judgment is granted in favor of FHLB-SF or OTS as substituted for FHLB-SF on plaintiff's fifth claim for interference with contractual relations and inducing breach of contract, sixth claim for intentional infliction of emotional distress, seventh claim for negligent infliction of emotional distress and eighth claim for negligence.

4. Motion by defendant OTS for reconsideration and vacation of this court's order of August 10, 1990, which substituted OTS for FHLB-SF is granted.

5. Judgment in favor of FDIC is granted as to plaintiff's claim for interference with contractual relations and inducing breach of contract.

6. This court's findings of fact and conclusions of law and order granting in part motions for summary judgment by defendants United States of America and Office of Thrift Supervision filed January 30, 1992, and entered January 31, 1992, are hereby amended to include FDIC, such that summary judgment is granted in favor of FDIC on plaintiff's claim for violation of the Privacy Act on the same basis that such summary judgment was granted in favor of defendants United States of America and OTS.

7. Motion by defendants for leave to depose fact witnesses is denied; motion by defendants for leave to depose plaintiff's expert witnesses is granted. Plaintiff shall make the expert witnesses he intends to call at trial available for deposition by defendants.

8. Motion by defendant Behrens for summary judgment is denied as to the Bivens claims.

9. Motions by defendant OTS to strike jury demand and to strike plaintiff's demand for punitive damages are denied as moot.

10. Plaintiff's claim for negligent infliction of emotional distress is dismissed without prejudice.

11. Counsel are advised that the claims remaining are as follows: The first and second claims under Bivens as against defendant Behrens and the eighth claim for negligence under the General Tort Claims Act as against defendant United States of America.[2]

Dated: September 6, 1994

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

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[2]The fifth claim for interference with contractual relations and inducing breach of contract against defendant Behrens, as to whom the United States of America has been substituted, is eliminated on the basis that the motion by the United States of America to dismiss said claim was granted by the order of October 6, 1989, on the grounds that such claims are excluded under the Federal Torts Claims Act. The sixth claim for intentional infliction of emotional distress against defendant Behrens, as to whom the United States of America has been substituted, is eliminated on the basis that the motion by the United States of America for summary judgment on said claim was granted by the order filed January 30, 1992, and entered January 31, 1992.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,
Defendants.

NO. CV 89-0969-RMT (TX)

ORDER CERTIFYING APPEAL AS FRIVOLOUS

FILED
November 7, 1994
Clerk, U.S. District Court
Central District of California

ENTERED
November 9, 1994
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the following: (1) *Ex parte* application by defendant John W. Behrens (filed by Behrens' appellate attorneys) filed November 1, 1994, for order vacating order entered October 27, 1994; (2) *Ex parte* application by plaintiff for order striking both the purported notice of appeal and the *ex parte* application filed November 1, 1994 by Behrens' appellate attorneys; and (3) *Ex parte* application by defendant United States of America for clarification of the October 27, 1994, order. Having considered the pleadings and other documents filed herein, the court has determined the following:

1. Behrens contends that his appeal of this court's denial of qualified immunity by denying his motion for summary judgment is not frivolous even in light of the "one appeal"

rule as pronounced in *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992), because said rule should not be applied to him retroactively. However, in *Pelletier*, it is clear that the Court already applied the "one appeal" rule retroactively to Behrens: The Court stated that [w]ith respect to the qualified immunity issue, because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction to consider his appeal." *Id.* at 867.

2. In light of the "one appeal" rule, Behrens currently pending appeal is frivolous and waived.

Accordingly,

IT IS ORDERED as follows:

1. The *ex parte* application by defendant Behrens for order vacating order entered October 27, 1994, is denied.

2. The interlocutory appeal of defendant Behrens to this court's September 7, 1994, order is certified as frivolous and waived by his prior interlocutory appeal in this action.

Dated: November 7, 1994

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

ROBERT J. PELLETIER,
Plaintiff-Appellee,
v.
FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, et al.,
Defendants,
and
JOHN W. BEHRENS,
Defendant-Appellant.

Nos. 89-56265, 92-55023.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted April 4, 1991.
Submission Vacated July 24, 1991.
Resubmitted Feb. 19, 1992.
Decided June 29, 1992.

Richard A. Olderman, U.S. Dept. of Justice, Washington, D.C., for defendant-appellant.

Samuel T. Rees, Knapp, Petersen & Clarke, Glendale, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior District Judge.*

REINHARDT, Circuit Judge:

Appellee Robert J. Pelletier brought this lawsuit to challenge certain regulatory actions that resulted in his dismissal as managing officer of Pioneer Savings and Loan Association and his subsequent inability to find comparable employ-

*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

ment in the savings and loan industry. As to defendant Behrens, Pelletier alleged both *Bivens*[1] and common law tort claims. Behrens now appeals the district court's denials of his motion to dismiss the *Bivens* claims based on qualified immunity and his motion to substitute the United States in his place as to the common law tort claims, pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA). We affirm in part and reverse in part. With respect to the qualified immunity issue, because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction to consider his appeal. We hold that Pelletier's allegations were sufficient to survive a motion to dismiss. With respect to the substitution issue, however, we conclude that the district court improperly applied a narrow "scope of authority" test rather than the broader "scope of employment" test required by the FELRTCA. Under the broader rule, we hold that as a matter of law Behrens was acting within the scope of his employment when he took the actions complained of by Pelletier. Accordingly, Behrens is entitled to substitution.

I

This case arises out of the early years of the savings and loan crisis. On March 29, 1984, the Federal Home Loan Bank Board (FHLBB) formally approved a *de novo* application for insurance of accounts made by South Coast Savings and Loan Association (South Coast). The FHLBB imposed a number of requirements on South Coast as conditions of regulatory approval. In particular, the FHLBB directed South Coast to "provide for the employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." Resolution

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[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

No. 84-164, ¶ 10(p) (March 29, 1984).[2] In early 1985, South Coast was succeeded in interest by Pioneer Savings and Loan Association (Pioneer). On March 18, 1985, Pioneer named appellee Robert J. Pelletier as its managing officer and, pursuant to Resolution No. 84-164, requested approval from the FHLBB.

Prior to accepting the position at Pioneer, Pelletier had served as Senior Vice President in charge of the Major Loan Division of the Beverly Hills Savings and Loan Association (BHSL).[3] In that capacity, Pelletier also sat on BHSL's Senior Loan Committee, which was responsible for evaluating and approving loans that exceeded dollar limits or fell outside of other criteria established by BHSL's Board of Directors. On April 23, 1985, shortly after Pioneer had requested FHLBB approval of Pelletier as its managing officer, the FHLBB declared BHSL insolvent and placed the institution in receivership. A continuing investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of BHSL raised questions regard-

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[2]The full text of the requirement reads:

[T]he institution shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent, on a salaried basis who shall be charged with full administrative and managerial responsibilities of the institution under policies established by its board of directors. In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following the beginning of the first full fiscal year, the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval.

Resolution No. 84-164, ¶ 10(p) (March 29, 1984).

[3]Pelletier resigned his position at BHSL in March, 1984, because he did not wish to relocate when BHSL moved to new offices. From mid-1984 to early 1985, Pelletier served as managing officer of Equitable Savings and Loan Association of Orange County. Again, he resigned rather than relocate his home. Shortly thereafter, he accepted Pioneer's offer of employment.

ing the conduct of a number of BHSL's senior officers, including Pelletier.

Appellant John W. Behrens, a Supervisory Agent of the FHLBB, took over the South Coast/Pioneer file from another Supervisory Agent in or about April, 1986.[4] On May 8, 1986, in a confidential letter on FHLBB letterhead, Behrens informed Pioneer that the FHLBB would be unable to proceed with the application for approval of Pelletier as Pioneer's managing officer until the investigation of BHSL was complete. The letter read as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard.

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[4]Behrens is a salaried employee of the Federal Home Loan Bank of San Francisco. On March 17, 1984, the FHLBB adopted Formal Resolution 84-126, which designated Behrens a Supervisory Agent of the FHLBB and FSLIC for the Eleventh District. In that capacity, Behrens became responsible for monitoring the operations of a number of federally insured savings and loan associations to ensure regulatory compliance. 12 C.F.R. § 501.11 (1989).

Upon receipt of the letter from Behrens, Pioneer requested Pelletier's resignation. When Pelletier refused to resign, Pioneer fired him. Despite numerous attempts, Pelletier subsequently has been unable to obtain comparable employment in the savings and loan industry. Pelletier alleges that several positions were tentatively offered to him, but that those offers were all withdrawn when the prospective employers learned of the circumstances surrounding Pelletier's departure from Pioneer.

In February, 1989, Pelletier filed suit against Behrens, the Federal Home Loan Bank of San Francisco, the FHLBB, and the United States, asserting that the decision to direct Pioneer to terminate Pelletier was made summarily and without process, and that since Pelletier's dismissal from Pioneer the defendants had made a concerted and successful effort to prevent Pelletier from securing employment in the financial services industry. Pelletier alleged that this conduct on the part of the defendants violated his fifth amendment right to procedural due process and deprived him of his constitutionally protected liberty interest in employment within the financial services industry. In addition, Pelletier alleged common law tort claims for interference with contractual rights, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.[5]

Behrens filed a motion to dismiss, or in the alternative for summary judgment. He contended that Pelletier's constitutional tort claims were barred by the statute of limitations and that, in any event, judicial creation of a *Bivens* remedy was preempted by the extensive federal regulation of the savings and loan industry. In the alternative, Behrens argued that he was entitled to qualified immunity from liability for

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[5]Pelletier also sought damages and injunctive relief for alleged violations of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Privacy Act, 5 U.S.C. § 552a.

the actions described. As to Pelletier's common law tort claims, Behrens argued that the United States should be substituted in his place as defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), Pub.L. No. 100-694, 102 Stat. 4563 (1988) (amending Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680). As required by the FELRTCA, Behrens submitted a scope of employment certification prepared by the Attorney General. 28 U.S.C. § 2679(d)(1).

The district court agreed that to the extent Pelletier sought relief for the loss of his job at Pioneer in 1986, his constitutional tort claims, as well as his claims for infliction of emotional distress, were barred by the statute of limitations.[6] However, the court denied Behrens's motion to dismiss Pelletier's constitutional claims as time-barred to the extent that Pelletier alleged continuing efforts to prevent him from securing employment in the savings and loan industry. Similarly, the court denied Behrens's motion to dismiss Pelletier's common law claims for infliction of emotional distress to the extent that those claims alleged continuing torts. The court also denied Behrens's motion to dismiss Pelletier's claims for intentional interference with contractual rights and negligence. The court declined to rule on Behrens's motion for summary judgment, on the ground that it would be premature to do so before discovery had been conducted.

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[6]The district court found that the statute of limitations for a *Bivens* claim originating in California is one year. The court's finding appears contrary to the rule established by our holding in *Marshall v. Kleppe*, 637 F.2d 1217, 1223-24 (9th Cir.1980); *see Van Strum v. Lawn*, 940 F.2d 406 (9th Cir.1991) (holding that the statute of limitations applicable to *Bivens* claims is the state statute of limitations for personal injury, but declining to give that holding retroactive effect). However, the parties do not contest this part of the district court's order in this limited interlocutory appeal.

Behrens timely appealed the district court's partial denial of his motion to dismiss Pelletier's constitutional and common law tort claims.[7] However, because it was unclear from the district court's order whether or not the court had ruled on Behrens's request for substitution of the United States as defendant with respect to Pelletier's common law tort claims, we vacated submission of the case and remanded to allow the district court to address the substitution issue. On limited remand, the district court denied Behrens's motion for substitution on the ground that removal of Pelletier from his position as managing officer was not within the scope of Behrens's authority as defined in 12 C.F.R. § 501.11 (1989), *repealed by* 54 Fed.Reg. 49,420 (1989). Behrens filed a separate appeal from that order. The appeals were consolidated by order of this court.

II

Behrens argues that the comprehensive federal regulation of the savings and loan industry precludes judicial creation of a *Bivens* remedy in this case. In the alternative, he argues that the allegations that form the basis of Pelletier's *Bivens* claims are as a matter of law insufficient to survive a motion to dismiss on the ground of qualified immunity. In response, Pelletier contends that the denial of a motion to dismiss is not an appealable interlocutory order. Because Pelletier's argument concerns our jurisdiction to hear this appeal, we address it first. We conclude that the denial of a motion to dismiss on the ground of qualified immunity is immediately appealable, but that Pelletier has alleged sufficient facts to survive such a motion.

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[7]Behrens does not contest the district court's disposition of his motion to dismiss with respect to Pelletier's APA and Privacy Act claims.

A

[1] We are satisfied that a denial of qualified immunity is an appealable "final" order under the test set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), regardless of whether that denial takes the form of a refusal to grant a defendant's motion to dismiss or a denial of summary judgment. *Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir.1991); *see also Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985) ("The denial of a defendant's *motion to dismiss* or for summary judgment on the ground of qualified immunity easily meets [the *Cohen*] requirements.") (emphasis added); *Schrob v. Catterson*, 948 F.2d 1402, 1406-07 (3d Cir.1991).[8] The Court has made it clear that because the entitlement at issue is "an *immunity from suit* rather than a mere defense to liability," claims of qualified immunity should be resolved at the earliest possible stage of the proceedings. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 (emphasis in original) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2737-38, 73 L.Ed.2d 396 (1982)). A requirement that official defendants answer wholly meritless claims for relief or adduce facts to refute entirely unsubstantiated allegations would run counter to the Court's express direction. We conclude that we have jurisdiction to consider Behrens's appeal.

We do not, however, hold that an official defendant claiming qualified immunity may take advantage of the several *opportunities* for immediate appeal afforded him by

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[8] *Cf. Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir.1991) (allowing interlocutory appeal from denial of motion to dismiss based on the *Feres* doctrine); *Marx v. Government of Guam*, 866 F.2d 294, 296 (9th Cir.1989) (allowing interlocutory appeal from denial of motion to dismiss based on sovereign immunity); *Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir.1988) (allowing interlocutory appeal from denial of motion to dismiss based on absolute immunity).

bringing repeated pretrial appeals. Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one. As we have previously observed, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decisions." *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir.1988); *see also Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816, 817 (9th Cir.1989). If appeals from denials of qualified immunity are also to become routine at the motion to dismiss stage, the burden on civil rights plaintiffs, in terms of both delay and expense, could be considerable.

More important, the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard of the Court's intent in creating the qualified immunity doctrine. The doctrine was created in order to protect good faith exercises of official discretion, not to shield willful or knowing lawless action taken under color of official authority. *Butz v. Economou*, 438 U.S. 478, 505-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978). It was intended to permit "[i]nsubstantial lawsuits [to] be quickly terminated," *id.* at 507, 98 S.Ct. at 2911, not to deter legitimate lawsuits from proceeding. The Court has repeatedly and emphatically refused to accord absolute immunity to government officials accused of constitutional transgressions. *Id.* at 505-06, 98 S.Ct. at 2910-11; *Scheuer v. Rhodes*, 416 U.S. 232, 237, 248-49, 94 S.Ct. 1683, 1686, 1692-93, 40 L.Ed.2d 90 (1974).

[2] For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his

favor, *see, e.g., Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir.1987), he also may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain. We do not think that a rule limiting defendants to one bite at the apple will be "peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under *Mitchell*, an official defendant claiming qualified immunity is entitled to immediate appellate consideration of a limited issue only. That issue is the narrow and "purely legal" one of "whether the facts alleged . . . support a claim of violation of clearly established law." 472 U.S. at 528 n. 9, 105 S.Ct. at 2816 n. 9. If the defendant's entitlement to qualified immunity is truly ascertainable as a matter of law without a need for full discovery or trial, determination of that fact should not require more than one judiciously timed appeal. As we discuss below, on appeal from a denial of a motion to dismiss we, like the district court, are required to view the nonmoving party's allegations in a generous light. If the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril. He may appeal immediately or he may answer the complaint and defer pursuit of his qualified immunity claim, and of appellate review of any denial of that claim, until it appears that a motion for summary judgment would be appropriate, Behrens has chosen the former route. We affirm his right to make that choice.

B

Behrens asserts that the comprehensive federal regulation of the savings and loan industry constitutes a "special factor" counseling against judicial creation of a *Bivens*

remedy for the wrongs allegedly suffered by Pelletier. *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 2467, 101 L.Ed.2d 370 (1988) ("When the design of a governmental program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *see also Saul v. United States*, 928 F.2d 829, 835-40 (9th Cir.1991). While this argument may merit consideration by the district court at a later stage in the proceedings, it is outside the limited scope of this interlocutory appeal. On review of a denial of qualified immunity, "[w]e have jurisdiction only to decide if defendant's conduct violated . . . clearly established constitutional rights." *Todd v. United States*, 849 F.2d 365, 368 (9th Cir.1998). The question whether a judicially created *remedy* is available for that conduct is not properly before us. Accordingly, we decline to address Behrens's preemption argument.

C

[3] We now proceed to consider whether, as Behrens maintains, Pelletier has failed to allege facts sufficient to support his claims that Behrens's conduct violated his clearly established constitutional rights. Because the district court elected to treat Behrens's motion for qualified immunity primarily as a motion to dismiss Pelletier's complaint for failure to state a claim, we will treat Behrens's appeal in like fashion.[9] We agree with the district court that Pelletier's pleadings are sufficiently specific.

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[9]The court declined to rule on Behrens's alternative motion for summary judgment on the ground that that motion was premature. It is not clear that Behrens has appealed that aspect of the district court's ruling. Moreover, his briefs fail to discuss the question of prematurity. In any event, the decision was well within the district court's discretion, and we will not disturb it.

As an initial matter Behrens argues that no constitutionally protected liberty or property interest in private employment exists where that employment is contingent on regulatory approval. Behrens relies on the Fifth Circuit's decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1213 (5th Cir.1989). We have not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled. Moreover, we need not do so here. In light of the district courts partial dismissal of Pelletier's *Bivens* claims as barred by the statute of limitations, the question whether Pelletier had a cognizable liberty or property interest in the particular position that he held at Pioneer is not before us.

[4] The district court preserved Pelletier's *Bivens* claims only to the extent that those claims allege continuing efforts by Behrens to prevent Pelletier from securing employment in the savings and loan industry.[10] We have recognized that ongoing interference with an individual's pursuit of his chosen livelihood may amount to deprivation of a constitutionally protected liberty interest in employment:

> An individual has a liberty interest in employment protected by the Due Process Clause if the dismissal is "for reasons that might seriously damage his standing in the community," *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982), or if the dismissal effectively precludes future work in the individual's chosen profession, *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

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[10]Most executive level appointments in that industry do not require prior regulatory approval. Thus, the *Connelly* issue is not relevant here.

Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir.1987). It is with respect to this clearly established right that we must examine the allegations contained in Pelletier's complaint.

[5] In order to survive a motion for *summary judgment*, the nonmoving party ordinarily must furnish affidavits containing admissible evidence tending to show the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). In *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir.1989), *amended on other grounds*, 906 F.2d 465 (9th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991), we considered this requirement as applied to a motion for summary judgment based on qualified immunity. We concluded that because the pendency of such a motion stays discovery by the plaintiff, the requirement of admissibility is somewhat relaxed and "greater tolerance of speculation and inference must be afforded." *Id.* at 927. Accordingly, affidavits submitted by the plaintiff that contain hearsay or other inadmissible evidence will suffice to preclude summary judgment if those affidavits are otherwise sufficient to defeat a claim of entitlement to qualified immunity. *Id.*

Behrens argues that Pelletier's charges of concerted action amount to no more than "vague assumptions about informal communications within an industry" and therefore fall outside the scope of the protection afforded by *DiMartini*. *Id.* We agree with Behrens that Pelletier's complaint raises at most nebulous theories of conspiracy, and that those theories in their current form would be insufficient to survive a motion for summary judgment even under *DiMartini*. However, as we have previously discussed, this case does not come before us following denial of a motion for summary judgment. Rather, Behrens appeals the district court's denial of his motion to dismiss Pelletier's *Bivens* claims.

[6-8] On a motion to dismiss, the court must accept the complaint's allegations as true in their entirety, *Williford v. California*, 352 F.2d 474, 475-76 (9th Cir.1965), and must draw all reasonable inferences in favor of the nonmoving party, *United States v. City of Redwood*, 640 F.2d 963, 966 (9th Cir.1981). There is no requirement that the nonmoving party supplement his pleadings with affidavits in order to survive a motion to dismiss.[11] If, liberally construed, Pelletier's complaint contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right, Pelletier is entitled to go forward with his *Bivens* claims against Behrens. *Cf. McCalden v. California Library Ass'n*, 955 F.2d 1214, 1221 (9th Cir.1992).

Upon examination of Pelletier's complaint, we conclude that it meets this minimal standard. Pelletier alleges that "[s]everal senior level jobs have been tentatively offered to him only to be withdrawn after learning of [Behrens's letter] and its impact upon Pelletier's employment at Pioneer" and that he remains "unable to secure other employment in the savings and loan and the financial institutions industries." Taken to be true, as they must for purposes of this appeal, those allegations, read in light of the more general allegations of the complaint, are sufficient to support the claim that Behrens violated Pelletier's clearly established right to pursue his chosen profession free from interference by the government.[12] *Merritt*, 827 F.2d at 1371. The

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[11]To the contrary, our review of the district court's ruling on a motion to dismiss is limited to the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989).

[12]The complaint makes the following general allegations regarding Behrens and the other defendants:

> 25. Pelletier is informed and believes and on that basis alleges that Defendants, and each of them, have made and continue to make a concerted effort to prevent Pelletier from securing employment in the financial institutions industry.

general allegations that the defendants, including Behrens, engaged in concerted action aimed at preventing Pelletier from securing employment in the savings and loan industry and at destroying his reputation support the inference that a cause and effect relationship existed between conduct on Behrens's part and the withdrawal of particular job offers. Accordingly, the district court's denial of Behrens's motion to dismiss Pelletier's *Bivens* claims was proper.[13]

III

Behrens contends that under the FELRTCA the district court was required to substitute the United States in his place as defendant with respect to Pelletier's common law tort claims. Again, Pelletier argues that the denial of substitution is not an appealable order. We disagree. An order denying substitution under the FELRTCA is precisely the type of order for which interlocutory review is contemplated under the *Cohen* collateral order doctrine. On the merits of the substitution issue, we conclude that the district court erroneously applied a "scope of authority" test to determine

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26. Pelletier is informed and believes and on that basis alleges that the Defendants have acted in concert with each other, and with others, and have prevented and continue to prevent him from securing any gainful employment in the savings and loan and related financial institutions industries.

27. Defendants' actions have created, and continue to create, a false and damaging impression about Pelletier in the savings and loan industry with respect to Pelletier's abilities, his performance and his honesty.

[13]In his brief, Pelletier argues that Behrens is a private party, and therefore not eligible for qualified immunity from liability in any event. However, Pelletier later concedes that Behrens was an agent of the FHLBB and FSLIC. We think it is clear that when a duly designated Supervisory Agent for the FHLBB and FSLIC discharges duties for those agencies, he is acting as a federal employee. *Saratoga Savings & Loan Ass'n v. Federal Home Loan Bank of San Francisco*, 724 F.Supp. 683, 685 (N.D.Cal.1989).

Behrens's eligibility for substitution rather than the broader "scope of employment" test required by the FELRTCA, and that under the correct analysis it is clear as a matter of law that Behrens was acting within the scope of his employment with respect to Pelletier. We therefore reverse the district court's denial of substitution.

A

[9] To constitute an appealable "final decision" under 28 U.S.C. § 1291, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1948)). We join the Fifth Circuit in holding that a district court order denying substitution of the United States as defendant under the FELRTCA satisfies this standard. *Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir.1990).[14]

As the Fifth Circuit recognized, the substitution provision of the FELRTCA constitutes a congressional grant of immunity *from suit* to eligible federal employees. *Id.; see also* H.R.Rep. No. 700, 100th Cong., 2d Sess. 2-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5945-47 (the FELRTCA is intended to provide federal employees with

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[14]It appears that the Second Circuit would also reach this conclusion. *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir.1989). The FELRTCA was enacted during the pendency of the *Yalkut* defendants' interlocutory appeal from the district court's denial of their motion for summary judgment based on absolute official immunity. *Id* at 34. Although *Yalkut* did not involve a motion for substitution under the FELRTCA, the Second Circuit applied the provisions of the FELRTCA retroactively in evaluating the defendants' entitlement to immunity. *Id.*

absolute immunity from suit for common law torts committed within the scope of their employment). A denial of substitution is thus analogous to a denial of qualified immunity. In both cases, the entitlement at issue is "like an absolute immunity [in that] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. at 526, 105 S.Ct. at 2815. Thus, the third prong of the *Cohen* test is met. Congress's clearly expressed intent to create an entitlement to immunity from suit virtually dictates the conclusion that a denial of substitution under the FELRTCA constitutes an appealable "final" order.

A denial of substitution under the FELRTCA also satisfies the first two prongs of the *Cohen* test. To issue such an order, the district court must review the certification issued by the Attorney General in light of specific documentary proof provided by the parties. *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir.1991). The order thus operates as a conclusive determination of the scope of employment issue. In addition, the scope of employment inquiry is entirely separable from the question whether liability in tort does or does not attach for the challenged conduct.

Pelletier argues that a denial of substittion is not immediately appealable because the scope of employment inquiry does not present a pure question of law but rather a mixed question of law and fact. *Meridian*, 939 F.2d at 745. *Cohen*, however, imposes no such requirement. As discussed above, under *Cohen* the issue appealed need only be separable from the merits of the underlying action. The rule established in *Mitchell vs. Forsyth*, 472 U.S. at 528 & n. 9, 105 S.Ct. at 2816 n. 9, that a denial of qualified immunity is immediately appealable only to the extent that the appeal presents a question of law, reflects the fact that the order appealed from in *Mitchell* was a denial of *summary judgment*. Put differently, *Mitchell* simply stands for the proposition that a

party appealing the denial of qualified immunity may not take advantage of the *Cohen* collateral order doctrine to circumvent the rules that govern summary judgment motions generally.

[10, 11] We note that the case before us presents a question of law — namely, whether the district court applied the proper test to determine whether Behrens was eligible for substitution — and that there do not appear to be any factual disputes regarding the scope of Behrens's *employment. See infra* Part III(B).[15] However, we also note that in ruling on a motion for substitution under the FELRTCA, the district court is authorized to hold an evidentiary hearing and resolve disputed questions of fact. *Meridian*, 939 F.2d at 745. An order granting or denying substitution is, in essence, a determination of subject matter jurisdiction to sue the United States under the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2674. When ruling on a challenge to subject matter jurisdiction, a district court ordinarily may hear evidence and resolve factual disputes relating to jurisdiction prior to trial. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983) (citing *Thornhill Publishing Co. v. General Tel. Corp.*, 594 F.2d 730, 733 (9th Cir.1979)). The questions of whether and when a district court may decline to rule on a motion for substitution prior to trial are not before us, and we will not address them here.

In short, a denial of substitution under the FELRTCA falls squarely within the class of immediately appealable orders defined by the *Cohen* collateral order doctrine. Accordingly, we proceed to consider the merits of Behrens's appeal.

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[15]As we demonstrate in Part III(B), the factual dispute that exists between the parties regarding the scope of Behrens's *authority* is irrelevant.

B

[12, 13] The FELRTCA provides that "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). A scope of employment certification issued by the Attorney General is subject to *de novo* review by the district court. *Meridian*, 939 F.2d at 745. In such a case, we review the district court's scope of employment determination *de novo*. *Id.*

The district court based its conclusion that Behrens was not acting within the scope of his employment as a Supervisory Agent of the FHLBB on the language of the FHLBB regulations then in force. The court found that under the FHLBB regulations governing supervisory agents, neither Behrens nor his Principal Supervisory Agent, James Cirona, had the authority to order that Pelletier be removed from his position as managing officer of Pioneer. 12 C.F.R. § 501.11 (1989), *repealed by* 54 Fed.Reg. 49,420 (1989).[16] In addi-

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[16]The regulation authorized the Principal Supervisory Agent and any duly designated Supervisory Agents to act in a purely advisory capacity to the FHLBB:

> (c) He shall confer and negotiate, pursuant to instructions from the Board and the Federal Savings and Loan Insurance Corporation . . . with applicants and with officers, directors, members, or creditors of applicant institutions . . . .
>
> (d) He shall see that Federal savings and loan associations and other insured institutions in his bank district submit to him for his consideration such matters . . . as are required to be acted upon by the Board or the Federal Savings and Loan Insurance Corporation by statute, rule, or regulation. When these matters come to the attention of said agent he shall, after giving them due consideration, submit them, together with such supplemental information as may be available to him, to the Board with his recommendations thereon.
>
> . . . . .

tion, the court found no evidence that the FHLB had delegated that authority to Behrens or to Cirona by any other means. Because removal of Pelletier from his position 'was not within the scope of Behrens's *authority* as defined by regulation, the court concluded that Behrens was not acting within the scope of his *employment*. That conclusion confuses the narrow sense in which "scope of employment" was understood for purposes of pre-FELRTCA doctrines of official immunity with the broader sense in which that term is used in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, of which the FELRTCA is a part.

Before the enactment of the FELRTCA established a statutory right to substitution, federal employees who were sued in tort for injuries arising out of conduct within the scope of their employment could attempt to assert the common law defense of official immunity. That defense shielded only conduct "within the outer perimeter" of the official's designated duties. *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959) (plurality opinion). Conduct outside the scope of an official's authority, as defined by statute, regulation, or established practice, was unprotected. *Id.* at 572, 79 S.Ct. at 1340 (" 'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers . . . . ' ") (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir.1949)).

In *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), the Court substantially narrowed the scope of the official immunity defense, holding that federal employees could not assert immunity from liability for

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(g) Such agent shall forward promptly to the Board copies of all transmittal and other supervisory letters . . . . The Board will consider the documents so forwarded and advise the said agent concerning such matters as may appear to be appropriate.

Id.

common law torts unless the conduct at issue was discretionary in nature. *Id.* at 297-98, 108 S.Ct. at 584-85. In order to restore immunity to federal employees who perform nondiscretionary functions, Congress enacted the FELRTCA, popularly known as the Westfall Act. H.R.Rep. No. 700, 100th Cong., 2d Sess. 3-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946-47. The FELRTCA amended the FTCA to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and . . . instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act." *Id.* at 4, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947.

Under the FTCA, an individual who has suffered an injury cognizable in tort as a result of the conduct of a federal employee may bring suit against the United States if that employee was "acting within the scope of his office or employment." *Id.* § 1346(b), 2674. The question whether a federal employee whose allegedly tortious conduct is the subject of a lawsuit under the FTCA was "acting within the scope of his office or employment" at the time of the injury is to be answered according to the principles of *respondeat superior* of the state in which the alleged tort occurred. *Proietti v. Civiletti*, 603 F.2d 88, 90 (9th Cir.1979) (citing *Williams v. United States*, 350 U.S. 857, 76 S.Ct. 100, 100 L.Ed. 761 (1955) (per curiam)); *see also Nasuti v. Scannell*, 906 F.2d 802, 805 n. 3 (1st Cir. 1990).

[14] The FELRTCA accords a right of substitution to any federal employee sued in tort who was "acting within the scope of his office or employment" when the allegedly tortious conduct occurred. 28 U.S.C. § 2679(d)(1). Logic and common sense dictate that the phrase "acting within the scope of his office or employment" be given the same meaning for purposes of the substitution provision of the

FELRTCA as it is for purposes of the FTCA generally, and every other circuit to consider the issue has so held. *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir.1991); *Johnson v. Carter*, 939 F.2d 180, 183 (4th Cir.), *vacated and reh'g en banc granted* (4th Cir. Oct. 9, 1991); *Arbour v. Jenkins*, 903 F.2d 416, 421-22 (6th Cir.1990); *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir.1989). In addition, the legislative history of the FELRTCA clearly establishes that Congress intended the principles of *respondeat superior* that govern FTCA actions to control decisions regarding entitlement to substitution. H.R.Rep. No. 700, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949. We conclude that the question of Behrens's entitlement to substitution is controlled by California principles of *respondeat superior*. It is to those principles that we now turn.

Under California law, the determinative factor in establishing vicarious liability under the doctrine of *respondeat superior* is not whether the employee's act was authorized, but whether the act was committed in the course of carrying out the employer's business. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 962, 227 Cal.Rptr. 106, 109, 719 P.2d 676, 679 (1986). Vicarious liability thus may attach for unauthorized, or even prohibited, conduct, if the risk of that conduct is " 'one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' " *Id.*, 227 Cal.Rptr. at 108, 719 P.2d at 678 (quoting *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 619, 124 Cal.Rptr. 143 (1975) (citations omitted)); *see also Liu v. Republic of China*, 892 F.2d 1419, 1427 (9th Cir.1989) ("California follows the 'enterprise theory' of liability."), *cert. dismissed*, ____ U.S. ____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1025-26 (9th Cir.1987), *cert. denied*, 485 U.S 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). By contrast, vicarious liability does not attach if the employee "has substantially deviated from his duties for personal

purposes." *Perez*, 719 P.2d at 679 (quoting *Hinman v. Westinghouse Elec. Co.*, 2 Cal.3d 956, 88 Cal.Rptr. 188, 471 P.2d 988, 990 (1970)).

Applying the rule set forth in *Perez* to the facts of the case before us, we think it is clear that, as a matter of law, Behrens was acting within the scope of his employment when he wrote the letter requesting Pelletier's resignation. Although Behrens was not authorized to remove Pelletier from his position as managing officer, his decision to ask Pioneer to do so did not constitute a deviation from his duties for personal purposes. Rather, Behrens wrote the letter to further his employer's "business" — namely, that of ensuring that the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals. Taking the allegations in Pelletier's complaint to be true, *see supra* Part II(C), it is equally clear that, notwithstanding the absence of any similar requirement for regulatory approval with respect to most executive level positions in the savings and loan industry, any subsequent communications that Behrens may have had with potential employers regarding Pelletier's qualifications were also within the scope of Behrens's employment. The "business" of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concern regardless of whether or not the employment was initially contingent on the FHLBB's approval. Our conclusion holds even if subsequent communications were made with the intent to cause Pelletier distress. Under California law, vicarious liability attaches for intentional torts committed by an employee so long as the employee was motivated in part by an intent to serve the employer. *Perez*, 719 P.2d at 680; *accord Liu*, 892 F.2d at 1428-29. Accordingly, we conclude that Behrens is entitled to substitution.

CONCLUSION

For the reasons stated above, we hold that we have jurisdiction to consider both questions raised by Behrens on appeal. We also hold that the district court correctly denied Behrens's motion to dismiss Pelletier's *Bivens* claims on the ground of qualified immunity, but that its refusal to substitute the United States as defendant in Behrens's place as to Pelletier's common law tort claims was error. Pelletier's request for attorneys' fees on appeal is denied.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Supreme Court, U.S.
FILED

941244 MAR 7 1995

OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

vs.

ROBERT J. PELLETIER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Is Mr. Behrens, a government official who claims qualified immunity, entitled to multiple interlocutory appeals from a denial of that claim in the circumstances of the instant case or may an appellate court limit such interlocutory appeals to one, at a time to be selected by the government official?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

A. There Exists No Conflict Among the Circuits . . . 11

B. *Mitchell* Does Not Mandate Multiple Interlocutory Appeals 14

C. Mr. Behrens Should Not Be Rewarded For His Tactical Delay in Seeking Review by this Court 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Page

Abel v. Miller,
904 F.2d 394 (7th Cir. 1990) 15, 18

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
403 U.S. 388 (1971) 4

English v. Dyke,
23 F.3d 1086 (6th Cir. 1994) 13, 14

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 16

Kaiter v. Town of Boxford,
836 F.2d 704 (1st Cir. 1988) 15

Kennedy v. City of Cleveland,
797 F.2d 297 (6th Cir. 1986) 14

Kulwicki v. Dawson,
969 F.2d 1454 (3rd Cir. 1992) 12

Mendocino Environmental Center v. Mendocino County,
14 F.3d 457 (9th Cir. 1994) 15

Mitchell v. Forsyth,
472 U.S. 511 (1985) . . . . . .

Murphy v. Moore,
849 F.2d 1101 (8th Cir. 1988) 12, 13

Nelson v. Silverman,
999 F.2d 417 (9th Cir. 1993) 15, 17-18

Pelletier vs. Federal Home Loan,
968 F.2d 865 (9th Cir. 1992) . . . . . .

Sinclair v. Schriber,
834 F.2d 103 (6th Cir. 1987) 13

United States v. United States District Court (Keith),
407 U.S. 297 (1972) 15, 16

Statutes

28 *U.S.C.* § 2671 4

Former 12 *U.S.C.* § 1730 (g),(h) and (q) 4

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

JOHN W. BEHRENS,
Petitioner,

VS.

ROBERT J. PELLETIER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert J. Pelletier responds to the Petition for Writ of Certiorari of John W. Behrens which seeks to review the order of the United States Court of Appeals for the Ninth Circuit dismissing petitioner's second interlocutory appeal as being precluded by petitioner's first interlocutory appeal.

OPINIONS BELOW

On October 9, 1991, the District Court below upon limited remand from the United States Court of Appeals for the Ninth Circuit entered its Order Re: Substitution of United States for Defendant John W. Behrens. This Order is attached to Respondent's Appendix, *infra*.

STATEMENT OF THE CASE

In May, 1986, Robert J. Pelletier was employed, pursuant to a written employment agreement, as the President and Chief Executive Officer of Pioneer Savings and Loan Association, a California chartered institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). He had been so employed for approximately 14 months and his employment had been approved by the California Savings and Loan Commissioner.[1] Indeed, Mr. Pelletier had been employed in the financial institution industry for many years.

It is conceded that on May 8, 1986, Mr. Behrens sent a letter to Pioneer's Board of Directors. This letter essentially directed Pioneer Savings to fire Mr. Pelletier and replace him with someone else. The letter suggested that such action was necessary because several years before Mr. Pelletier had been a senior officer with a financial institution which had recently failed, although Mr. Behrens had no evidence of any improper action by Mr. Pelletier. It is also undisputed that immediately upon receipt of this letter, Pioneer Savings' Directors fired Mr. Pelletier and that subsequently he has been unable to secure any financial institution position.

Mr. Behrens' commanded such obedience from Pioneer Savings because his letter was written under color of federal law on federal regulatory letterhead. At the time of the issuance of his letter, Mr. Behrens was a subordinate "supervisory agent" for the FSLIC and its operating head, the Federal Home Loan Bank Board ("FHLBB"). In that capacity, Mr. Behrens was the line supervisory agent responsible for federal oversight of Pioneer Savings and for recommendations on all regulatory applications concerning that institution. Mr. Behrens, however,

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1 The Petition asserts as if an uncontested fact that Mr. Pelletier's employment was conditional. Such was not the case. While the FHLBB/FSLIC had the power to remove Mr. Pelletier from his position and prohibit him from taking any similar position, Mr. Behrens lacked any authority to approve or disapprove of Mr. Pelletier's employment, to remove him from that employment, or to prohibit him from taking other employment with an insured financial institution.

had no legal authority to approve of Mr. Pelletier's employment nor had Mr. Behrens any lawful power to remove Mr. Pelletier from his position as an officer, such authority having been granted to the FHLBB/FSLIC under appropriate circumstances and subject to administrative due process rights.[2]

In seeking subsequent employment, Mr. Pelletier has been required to disclose the reason for his termination from Pioneer Savings; and upon learning that this termination was based upon regulatory direction, prospective employers have all declined to employ him. Mr. Pelletier also has been utterly unsuccessful in causing Mr. Behrens' letter to be either withdrawn or retracted by the appropriate Federal agencies.

As a result, Mr. Pelletier became essentially unemployable during the time in his life when his income should have been at its highest and provided him and his wife with retirement funds. After nine years, Mr. Pelletier has become technically obsolete in his field. Mr. Pelletier and his wife lost their savings, their vacation property, and ultimately their home. They now reside in a trailer and subsist on Social Security retirement benefits.

In the meantime, Mr. Behrens has bragged to a fellow supervisory agent that he was finally able to "get rid of Pelletier".

When it became clear that he was unemployable, Mr. Pelletier commenced this action in February, 1989, and for the last six years has been attempting to cause this action to be tried. The action now consists of two claims: A claim for money damages for violation of Constitutional rights as against Mr. Behrens under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and a separate claim for negligence against the United States under the Federal Tort Claims Act (28 *U.S.C.* § 2671, *et seq.*). The action was set for trial on May 16, 1995, after numerous prior trial dates were vacated or continued because of

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[2] See former 12 *U.S.C.* § 1730 (g),(h) and (q) then applicable.

Mr. Behrens' delaying tactics. Further proceedings in the Court below have been stayed by Justice O'Connor as Circuit Justice.

Mr. Behrens, currently a government employee and represented in the District Court by Department of Justice lawyers apparently at taxpayer expense, has managed to avoid a trial on the merits utilizing every conceivable delaying tactic.

After successfully evading service of process for some time, Mr. Behrens' first appearance was by motion to dismiss based upon a claim of qualified immunity. (At the same time, Mr. Behrens moved for summary judgment but refused to submit to a deposition.)

The District Court's first review of the qualified immunity claim occurred in September, 1989, when the District Court denied Mr. Behrens' request to stay discovery. The Ninth Circuit's first review of Mr. Behrens' qualified immunity claim when he sought a stay of discovery from that Court, which was denied.

In October, 1989, the District Court denied the motion to dismiss for qualified immunity on the merits and denied the summary judgment motion as premature until discovery was provided. The District Court did, though, limit Mr. Pelletier's claims to conduct occurring within one year of suit.

Mr. Behrens appealed both orders to the Ninth Circuit, which then became his second appellate review of his claim to qualified immunity. At the same time, Mr. Behrens appealed the apparent denial of his request to have the United States substituted in his place as to the common law tort claims.

While the appeal was being briefed and argued, Mr. Behrens undertook no effort to renew his motion for summary judgment previously denied as premature. Instead, Mr. Behrens relied on his interlocutory appeal to the Ninth Circuit to extricate himself from the litigation.

The Ninth Circuit made a limited remand for a decision on Mr. Behrens' substitution request. This limited remand resulted

in the District Court's October 9, 1991, Order Re: Substitution, etc. (Respondent's Appendix, *infra*). That Substitution Order specifically found that Mr. Behrens' May 8, 1986 letter to Pioneer Savings caused Pioneer to remove Mr. Pelletier from his job and that Mr. Behrens lacked the authority to order such a removal.

While the appeal was pending, Mr. Pelletier was concerned about the effect of repetitive interlocutory appeals on his ability to secure a prompt trial. In his opening brief to the Ninth Circuit in the first appeal, Mr. Pelletier questioned whether interlocutory appeals should be permitted from denials of motions to dismiss because interlocutory appeals concerning qualified immunity were subject to abuse by governmental defendants who used the appeal process to delay and harass. Mr. Pelletier asserted that such interlocutory appeal should be restricted to appeals from denial of motions for summary judgment and that sanctions should be awarded for frivolous appeals. Thus, from the outset, the issue of multiple interlocutory appeals and their effect upon injured plaintiffs was raised by Mr. Pelletier and Mr. Behrens made the apparent decision to proceed with the appeal notwithstanding the multiple appeal argument.

As trial approached in the District Court and no decision had been rendered on the appeal, the Ninth Circuit in January 1992, stayed further proceedings pending its decision. The Ninth Circuit's stay order remained in force until September, 1993, when the action was finally remanded to the District Court; thus, Mr. Behrens first interlocutory appeal caused a two year trial delay.

On June 29, 1992, the Ninth Circuit issued its opinion in *Pelletier vs. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992). By that opinion, the Court affirmed the denial of the motion to dismiss and dealt with the purely legal issue which could be raised on such an interlocutory appeal. The Court held that Mr. Pelletier had asserted a violation of a clearly established right to pursue a chosen profession free of governmental interference, even thought the Court did not reach the issue of whether Mr. Pelletier's specific employment with Pioneer Savings was

similarly protected. The Court also ordered the United States substituted for Mr. Behrens on the common law claims finding that the District Court had applied the wrong standard for review but without disturbing the facts so found to exist.

The Ninth Circuit also specifically addressed the multiple interlocutory appeal "abuse" issue raised by Pelletier. The Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one.
> *Pelletier* at 870.

The Ninth Circuit then held that "One such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 871. In reaching this holding, the Ninth Circuit provided that the government official is entitled to make the strategic choice of whether to file an interlocutory appeal from the denial of a motion to dismiss or wait and appeal the denial of summary judgment. Moreover, the Court considered that an interlocutory appeal from the denial of a claim for qualified immunity raises only a purely legal issue for review and, thus, "should not require more than one judiciously timed appeal." *Pelletier* at 871.

The foregoing single interlocutory appeal holding was not ignored by Mr. Behrens. Indeed, in August, 1992, Mr. Behrens filed his Petition for Panel Rehearing. By that Petition, Mr. Behrens sought to have the Ninth Circuit reconsider its ruling on qualified immunity and also delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, Mr. Behrens' Petition was unanimously denied.

No Petition for a Writ of Certiorari was sought by Mr. Behrens seeking a review by this Court of either holding.

Mr. Behrens first interlocutory appeal took four years to decide before it was remanded to the District Court. After the case was ready for trial, the first interlocutory appeal delayed the trial for nearly two years. Throughout this time period, Mr. Pelletier remained without work and without the self respect which flows from working in his chosen field.

When the action returned to the District Court, Mr. Behrens filed a new motion for summary judgment on the basis of qualified immunity. Mr. Pelletier also moved to reinstate his *Bivens* claim to the extent previously held as untimely and Mr. Behrens stipulated to the granting of that motion.

There were no new legal theories advanced in the summary judgment motion which were not or could not have been made during the earlier motion to dismiss. Moreover, the discovery and concessions had strengthened Mr. Pelletier's case. The Substitution Order of the District Court was to the effect that Mr. Behrens knowingly exceeded his authority in writing the letter directing termination. Nevertheless, Mr. Behrens utilized the pendency of this new motion to further delay trial and pre-trial proceedings. The motion for summary judgment was denied by the District Court on September 7, 1994.

At the time of this summary judgment denial, the District Court had scheduled the pre-trial conference for December 5, 1994, and the trial for January 10, 1995. Pursuant to local rule, the parties were required to meet and exchange all trial exhibits, witness lists, expert reports and trial contentions forty days before the pre-trial conference (October 25, 1994). To avoid these responsibilities, Mr. Behrens filed a new notice of appeal, thus, attempting to initiate his second full interlocutory appeal and at least his sixth interlocutory review of his qualified immunity defense. At the same time, Mr. Behrens' counsel notified all parties that in her view the filing of the notice of appeal resulted in the automatic imposition of an stay of proceedings in the District Court. Based upon that interpretation, Mr. Behrens refused to participate in pre-trial proceedings and attempted to cancel expert depositions.

Mr. Pelletier responded to these further delaying tactics by immediately filing a motion in the Ninth Circuit to dismiss the appeal for lack of jurisdiction and an application in the District Court to have the appeal certified as frivolous. On November 7, 1994, the District Court, in fact, found the appeal to be frivolous and thereby put the action back on track for trial. Mr. Behrens then applied to the Ninth Circuit for a stay of proceedings in the District Court.

On November 17, 1994, the Ninth Circuit ruled on the motion to dismiss and the stay application. The Court dismissed the appeal for lack of jurisdiction and denied the stay application.

Mr. Behrens' writ petition and application for stay to this Court followed.

SUMMARY OF THE ARGUMENT

Mr. Behrens seeks to have this Court permit him to further delay the trial of this action for several more years while he processes a second full interlocutory appeal which will not affect whether he must stand trial. In order to secure this result, Mr. Behrens asks this Court to fashion a uniform rule that government officials are entitled to prosecute unlimited interlocutory appeals even though the limited issue on appeal is purely a question of law.

In an attempt to secure review by this Court, Mr. Behrens asserts that there is a conflict among the circuits although no circuit has yet held that multiple interlocutory appeals are required and those circuits who have actually decided the issue on the merits have all denied multiple appeals.

Mr. Behrens next asserts that this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) mandates that a governmental defendant is entitled to serial interlocutory appeals every time his assertion of qualified immunity is rejected. It is submitted that this assertion is a misreading of *Mitchell*.

Finally, it is submitted that this Petition should be denied because Mr. Behrens could have raised the issue of an entitlement to serial appeals to this Court in 1993 when the Ninth Circuit refused to delete the "one interlocutory appeal rule" from its opinion in *Pelletier* and his delay until now should be viewed merely as an improper tactic.

ARGUMENT

This Court in *Mitchell* held that a governmental official is entitled to an interlocutory appeal from the denial of his claim to qualified immunity. Mr. Pelletier does not dispute this holding nor does the Petition seek to review the holding. Indeed, Mr. Behrens secured an interlocutory review by the Ninth Circuit and that review is reported in *Pelletier v. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992).

Mitchell also holds that an interlocutory appeal from the denial of a claim for qualified immunity is a limited appeal on a purely legal issue - whether a "clearly established right" is asserted to have been violated. As stated by this Court:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's view of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.[9]

9. We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some

> cases, the defendant) support a claim of violation of clearly established law.

Mitchell, at 528.

By his Petition, Mr. Behrens essentially seeks a review of this holding and would have this Court hold that this purely legal issue should be the subject of multiple interlocutory appeals as he forum shops for an appellate panel which supports his view of the law.

In *Pelletier, supra*, at 871-73 , the Ninth Circuit held that Pelletier had alleged a violation of a clearly established right in the form of a Constitutionally protected liberty interest in employment. While the Ninth Circuit did not at that time decide whether Mr. Pelletier had a Constitutional right to his job with Pioneer Savings, it did hold that he had a Constitutional right to pursue his chosen profession free of governmental interference of the type allegedly caused by Mr. Behrens.

In denying Mr. Behrens' second motion for summary judgment, the District Court held again that Mr. Pelletier has a Constitutionally protected right to pursue his chosen profession free of unreasonable governmental interference, which is precisely the legal issue previously affirmed by the Ninth Circuit in *Pelletier*. The District Court also held that Mr. Pelletier had a Constitutionally protected right to his employment with Pioneer Savings free of unreasonable governmental interference.

While Mr. Behrens is correct that he has not had an opportunity to test the latter issue (right to Pioneer employment) by interlocutory appeal, he has already tested and lost the first issue (right to future employment) and must stand trial on the first issue regardless of the outcome of any interlocutory appeal on the second issue. Mr. Behrens' only hope of avoiding trial is then to secure a second interlocutory appeal on precisely the same interlocutory issue decided in *Pelletier* in the hope that a different panel of the Ninth Circuit may be persuaded to reach a different result. *Mitchell* demands no such opportunity for multiple appeals and forum shopping.

A. There Exists No Conflict Among the Circuits.

The "conflict among the circuits," claimed by Mr. Behrens, does not exist. In no case cited by Mr. Behrens has a Federal Court of Appeals heard a second interlocutory appeal on qualified immunity grounds. Out of five cases cited for the "two interlocutory appeal" rule, only one even contains *dictum* supporting such a rule.

Mr. Behrens contends that the Third, Sixth, and Eighth Circuits have allowed two interlocutory appeals on the issue of qualified immunity. Even a superficial reading of the opinions cited by Mr. Behrens discloses that only the Sixth Circuit has even addressed the subject and did so in *dictum*.

Mr. Behrens' only Third Circuit authority fails to create any conflict among the circuits. *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3rd Cir. 1992) merely contains a footnote commenting that an interlocutory appeal of a District Court's denial of qualified immunity might be appealed either after the denial of a motion to dismiss or after the denial of a motion for summary judgment. Contrary to Mr. Behrens' portrayal of the case, *Kulwicki* contains no *dictum* stating that multiple interlocutory appeals are permitted on the issue of qualified immunity.

Mr. Behrens' only Eighth Circuit authority fails to create any conflict among the circuits. *Murphy v. Moore*, 849 F.2d 1101 (8th Cir. 1988), involves a single interlocutory appeal of a denial of absolute immunity. The opinion addresses interlocutory appeals of the denial of qualified immunity only indirectly, and never addresses the issue of multiple interlocutory appeals of the denial of qualified immunity.

In *Murphy*, the plaintiff sued, *inter alia*, a Missouri assistant attorney general, Ms. Mescher. Ms. Mescher moved to dismiss on the grounds of absolute immunity and her motion was denied. She appealed the court's denial of her motion, and Mr. Murphy moved to dismiss the appeal on the grounds that it was premature, arguing that Ms. Mescher's appeal should be denied until her right to qualified immunity had also been

denied. *Murphy, supra* at 103. The Eighth Circuit denied Mr. Murphy's motion and allowed Ms. Mescher to appeal the denial of absolute immunity. In *dictum*, the court commented that Ms. Mescher would be able to pursue a second interlocutory appeal on the previously undecided issue of qualified immunity. The court did not address either directly or otherwise the question of whether a defendant might pursue two interlocutory appeals on the question of qualified immunity.

Mr. Behrens' three Sixth Circuit opinions include only one which arguably -- and only in *dictum* -- supports his position on the issue presented by his Petition. However, closely examined, that support is illusory.

In *Sinclair v. Schriber,* 834 F.2d 103, 104 (6th Cir. 1987), the Court of Appeal dismissed for lack of jurisdiction an interlocutory appeal from an order "denying defendant's motion for summary judgment on the basis of good-faith immunity."

English v. Dyke, 23 F.3d 1086 (6th Cir. 1994) involves only a single appeal of the denial of qualified immunity. Mr. English, a prisoner, sued *pro se* over a change in his security classification and transfer to temporary segregation. *English supra* at 1088. Defendants moved to dismiss on the grounds that Mr. English had no liberty interest in his security classification, and the motion was denied.

Defendants then answered, and subsequently moved for summary judgment on qualified immunity grounds. The District Court denied that post-answer summary judgment motion on the grounds that the arguments were no different from those defendants made in their pre-answer motion to dismiss. Defendants then filed their only interlocutory appeal. The Court of Appeal disagreed with the District Court on the similarity between the two motions:

> The pre-answer motion asked the court to decide whether defendants' actions as alleged in the Complaint, violated plaintiff's constitutional rights. The second motion, based on qualified immunity, asked the court to decide whether defendants' alleged actions

> violated plaintiff's rights under clearly established law. A decision in plaintiff's favor on the first question did not require a decision for plaintiff on the question of qualified immunity.
> *English*, at 1103 (emphasis added).

English, then, raises no issue regarding the propriety of a second interlocutory appeal on grounds of qualified immunity.

Finally, *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), does contain a discussion of whether two interlocutory appeals should be allowed on grounds of qualified immunity. That discussion, however, is purely *dictum*, because the case itself involves no second interlocutory appeal.

The Sixth Circuit panel speculated that two interlocutory appeals might be permitted where the first was from an order denying qualified immunity at the pleading stage because the plaintiff had pled facts which, if proven, would describe a violation of clearly established law, and where the second was from an order denying summary judgment on the grounds that plaintiff has produced sufficient evidence of a violation of clearly established law to proceed to trial. *Kennedy, supra*, at 299. However, not only is that discussion *dictum*, it is also inapposite to the instant case where the facts are not in dispute.

Moreover, the support Mr. Behrens finds in *Kennedy* is also contrary to *Mitchell's* holding that the interlocutory appeal only concerns a purely legal issue of whether the law was clearly established at the time it was allegedly violated. An appeal from an order denying summary judgment on the grounds that there is a triable issue of fact as to whether the defendant's conduct is violative of some admittedly clearly established law is not an appeal from an order denying a defendant the protection of qualified immunity. Rather, if the law is clearly established, the court's finding of triable issues of fact as to whether that clearly established law has been violated by the defendant's conduct differs in no material way from the finding required of any summary judgment motion. For this reason, the *Kennedy* dictum is inapposite to the instant case where the facts are not in dispute and, indeed, contrary to *Mitchell's* admonition

that "[a]n appellate court . . . need not consider the correctness of the plaintiff's version of the facts . . . ." *Mitchell* at 528.

B. *Mitchell* Does Not Mandate Multiple Interlocutory Appeals.

Mr. Behrens correctly notes that three circuits limit a governmental defendant to only two appeals from a denial of a claim for qualified immunity. One appeal is interlocutory and one appeal is from the final judgment. This permits a governmental defendant one more appeal than the plaintiff receives.

The Ninth Circuit's position is stated in *Pelletier, supra*, as reaffirmed in *Nelsonv. Silverman*, 999 F.2d 417 (9th Cir. 1993) and *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460-461 (9th Cir. 1994). The Seventh Circuit's decision is found in *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990) and the First Circuit's decision in *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-708 (1st Cir. 1988), both of which opinions predate *Pelletier*. Indeed, *Kaiter* predates Mr. Behrens' first appeal to the Ninth Circuit and was undoubtedly known by his Department of Justice trial and appellate lawyers when Mr. Behrens made the decision to prosecute an interlocutory appeal at that time.

Mr. Behrens fails, however, to provide any substantial argument for the proposition that differing Circuit rules is improper. Instead, he asserts that *Mitchell* mandates that governmental defendants be allowed essentially unlimited multiple interlocutory appeals and any limitation on that right is erroneous. *Mitchell* provides no such holding.

In *Mitchell*, the defendant (former attorney general John Mitchell) was sued over a warrantless wiretap by Forsyth. After the wiretap but before the lawsuit began, this Court held, in *United States v. United States District Court* (Keith), 407 U.S. 297 (1972), that the Fourth Amendment did not permit warrantless wiretaps in circumstances like those involving Forsyth. That holding led to Forsyth's action against Mitchell and the issue of whether the *Keith* rule applied retroactively.

On cross-motions for summary judgment, after five years of litigation, the District Court denied Mitchell summary judgment on the issue of absolute immunity. At the same time, it considered the retroactive effect of *Keith* and it considered Mitchell's claim of qualified immunity relying upon subjective standard applied to qualified immunity claims prior to this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The District Court ruled that neither party was entitled to summary judgment on the issue of qualified immunity because neither side had met its burden of proving that no triable issue of fact existed as to Mitchell's good faith.

Mr. Mitchell prosecuted an interlocutory appeal on the District Court's denial of absolute immunity and not on the District Court's denial of summary judgment on qualified immunity.

The Third Circuit remanded the case for further fact finding on the question of whether the wiretap served a prosecutorial purpose. The District Court received evidence on this point and ruled that it did not. At the same time, the District Court reconsidered its ruling on qualified immunity in light of the new *Harlow* "objective" standard. On the issue of qualified immunity, the District Court held that *Keith* was merely an extension of existing law, and that Mitchell had gambled on a change in the law and lost. The District Court denied Mitchell's motion and granted Forsyth's motion as to liability.

Mitchell appealed again, contending that he was entitled to both qualified and absolute immunity. This appeal was the first time Mitchell had raised qualified immunity on appeal. The Court of Appeals held against Mitchell and he sought review in this Court.

Accordingly and contrary to Mr. Behrens' argument, *Mitchell* does not hold that a governmental defendant is entitled to more than one interlocutory appeal on the issue of qualified immunity. The issue was not raised.

Since this Court ruled that the issue on an interlocutory appeal is a limited, legal issue, such consideration suggests that

there be merely one well timed appeal to resolve the narrow legal issue. *Pelletier* is consistent with this holding as are the other decisions limiting governmental defendants to one interlocutory appeal of the narrow, legal issue so reviewable.

When Mr. Behrens in 1989 first appealed the denial of his motion to dismiss, Mr. Pelletier asserted that *Mitchell* did not provide authority for an interlocutory appeal from a motion to dismiss denial but only from a summary judgment denial. As noted above, *Mitchell* in fact involved an interlocutory appeal after competing summary judgment motions. In adopting the one interlocutory appeal limitation, the Ninth Circuit in *Pelletier* in essence expanded governmental defendants' appeal rights to include appeals from denials of motions to dismiss and left to governmental defendants the choice of when best to raise the purely legal issue permitted on such an interlocutory appeal. Mr. Behrens now does not like the choice which he made.

C. Mr. Behrens Should Not Be Rewarded For His Tactical Delay in Seeking Review by this Court.

Were this Court inclined to review the one well-timed interlocutory appeal rule, this is not the case in which to consider the issue as Mr. Behrens has unconscionably delayed seeking such review. The time for this review should have been in 1993 when the rule was announced and the Ninth Circuit refused to modify its opinion to delete the rule. However, Mr. Behrens chose not to seek review of this Court at that time.

The Court's which have imposed a "one interlocutory appeal" rule have attempted to balance the equities in view of the reality of knee-jerk appeals from every denial of qualified immunity. As stated by the Ninth Circuit in *Nelson, supra* at 418:

> The opportunity to appeal an adverse qualified immunity ruling in advance of trial serves the important purpose of preserving the role of the defense as "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, 105 S. Ct. at

> 2815 (emphasis in original). However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets. In *Pelletier*, we reasoned that one appeal should be sufficient to resolve the legal issues pertinent to a claim of qualified immunity, and hence, that the price is worth paying once but not repeatedly.

The Ninth Circuit's analysis could not have been closer to the mark in this case. Mr. Behrens has clearly attempted to impose on Mr. Pelletier substantial expense and delay lasting for years. The conduct has thoroughly disrupted the docket of the Court below. Nevertheless, Mr. Behrens seeks to have Mr. Pelletier run the same gamut again and to do so on the eve of trial.

As stated by the Seventh Circuit in *Abel, supra* at 396:

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.

Mr. Behrens argument, if taken to its logical extreme, would never permit a civil rights plaintiff to have his day in court. First, a governmental defendant would move to dismiss the complaint and appeal the denial. Then, the governmental defendant would move for summary judgment and appeal the denial. Every time the matter is remanded, a new motion for summary judgment would then be filed and its denial appealed. Every new appellate case would be ground for reconsideration

in the trial court and a follow-up appeal. There would be no end in sight.

Constantly preparing for trial only to have the trial continued by last minute delaying tactics is expensive, time consuming and emotionally exhaustive. Trial witness necessary to give life to a plaintiff's case retire, move out of area and even die making it necessary to rely on dry deposition testimony. In this action, Mr. Behrens' supervisor has left government employment during these delays and may refuse to return for trial.

Mr. Behrens has already had one interlocutory appeal which he commenced in December 1989 and which resulted in a stay which lasted until September 24, 1993. At that time, the Ninth Circuit unanimously denied Mr. Behrens' Petition for Panel Rehearing, which sought to eliminate the "one interlocutory appeal" rule. Nevertheless, Mr. Behrens sought no review from this Court. He should not be allowed to prosper from his delaying tactics.

CONCLUSION

Mr. Pelletier has waited nearly six years for a trial on the merits of his claims. Four of those years have been spent in a prior interlocutory appeal. As a result of the first appeal, the Ninth Circuit has held that one of the two violations of Mr. Pelletier's Constitutional rights committed by Mr. Behrens was indeed clearly established at the time of the violation. Mr. Behrens now demands a second interlocutory appeal to reconsider the ruling of the first appeal and also review whether the second violation involved a clearly established Constitutional right.

The Ninth Circuit denied Mr. Behrens a second bite of the same apple. Had it permitted an interlocutory appeal only as to the previously undecided issue, Mr. Behrens would still be required to stand trial regardless of the outcome of the second appeal. As a result, no purpose is served by an interlocutory appeal.

Mr. Behrens also had an opportunity to seek review of this Court in 1993 when the "one interlocutory appeal" rule was announced but chose not to file a Petition.

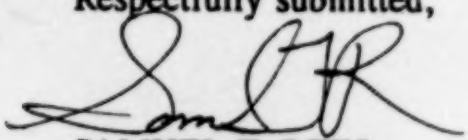
Mr. Behrens asserts that there is now a conflict among the circuits on this issue but a review of the cases shows such not to be the case.

Reliance on *Mitchell* to support a "repeated interlocutory appeal" rule is misplaced both factually and based upon the limited nature of the interlocutory appeal permitted.

Mr. Pelletier submits that the Petition for Writ of Certiorari should properly be denied.

Dated: March 2, 1995

Respectfully submitted,



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Robert J. Pelletier
Plaintiff

vs.

Federal Home Loan Bank of
San Francisco, et al.,
Defendants.

NO. CV 89-0969-RMT (Tx)

ORDER RE: SUBSTITUTION OF
UNITED STATES FOR DEFENDANT
JOHN W. BEHRENS

FILED
October 8, 1991
Clerk, U.S. District Court
Central District of California

This matter has come before the court on the order by the court for the parties to file further briefing on whether the United States should be substituted as defendant in place of defendant John W. Behrens ("Behrens") for the common law tort claims. Having considered the pleadings and other documents filed herein, the court finds the following:

1. Behrens was a federal employee when he sent the May 8, 1996 letter to Pioneer Savings and Loan Association ("Pioneer") because he was acting in the capacity of Supervisory Agent for the Federal Home Loan Bank Board ("FHLBB"), a federal agency.

2. The May 8, 1996, letter sent by Behrens to Pioneer directed Pioneer to remove plaintiff from his position as managing officer.

3. FHLBB had the authority to remove plaintiff from his position as managing officer, and FHLBB had the power to delegate this authority to any of its supervisory agents. 12 U.S.C. §1437(a). However, there is no evidence that FHLBB had the power to delegate this authority to order removal of Pelletier form his position as Managing Officer.

4. Additionally, because the Principal Supervisory Agent, James M. Cirona ("Cirona"), did not have the authority to order removal of plaintiff without prior approval of FHLBB, and because there is no evidence that FHLBB authorized Cirona to remove plaintiff, Cirona, could not have delegated the authority to remove to Behrens. 12 C.F.R. §501.11(c), (d) and (g).

5. Therefore, Behrens was not acting within the scope of his employment when he ordered Pioneer to remove plaintiff from his position as managing officer.

Accordingly,

IT IS ORDERED that the United States should not be substituted for defendant John W. Behrens for the common law tort claims.

Dated: 10-4-91

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

(1)

Supreme Court, U.S.
FILED
MAY 12 1995
CLERK

No. 94-1244

In The

Supreme Court of the United States

October Term, 1994

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
Volume I, Pages 1 to 209

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INDEX

Page

VOLUME I

Chronological List of Relevant Docket Entries 1

Plaintiff's First Amended Complaint, EOD February 23, 1989 7

District Court's Order Vacating Order Staying Discovery, EOD September 11, 1989 25

District Court's Order Denying Defendant's Motion to Dismiss, EOD October 5, 1989 26

Defendant's Answer, EOD October 30, 1989 30

Defendant's Notice of Appeal, EOD November 2, 1989 42

Defendant/Appellant's Motion for Stay, EOD February 5, 1990 51

Defendant/Appellant's Brief, EOD March 6, 1990 72

Court of Appeals' Order Denying Stay, EOD March 14, 1990 127

Plaintiff/Appellee's Brief in Opposition, EOD April 17, 1990 128

Defendant/Appellant's Reply Brief, EOD May 1, 1990 158

Court of Appeals' Order Requesting Supplemental Briefs, EOD January 6, 1992 187

Defendant/Appellant's Motion to Stay, EOD January 24, 1992 189

INDEX – Continued

Page

VOLUME II

Defendant/Appellant's Supplemental Brief, EOD January 28, 1992 210

Court of Appeals' Order Granting Stay, EOD January 31, 1992 227

Plaintiff/Appellee's Supplemental Brief in Opposition, EOD February 10, 1992 228

Defendant/Appellant's Supplemental Reply Brief, EOD February 19, 1992 255

Court of Appeals' Order Affirming, Reversing, and Remanding, EOD June 29, 1992 ... Pet. App. 10a

Defendant/Appellant's Petition For Panel Rehearing, EOD August 12, 1992 269

Court of Appeals' Order Denying Rehearing, EOD September 24, 1993 282

Defendant's Memoranda in Support of Summary Judgment, EOD March 1, 1994 283

Plaintiff's Memorandum in Opposition to Summary Judgment, EOD March 14, 1994 310

Defendant's Reply to Opposition to Summary Judgment, EOD March 21, 1994 333

District Courts' Order Denying Summary Judgment, EOD September 6, 1994 ..... Pet. App. 2a

Plaintiff's Application to Certify Appeal as Frivolous, EOD November 1, 1994 359

Defendant's Opposition to Application, EOD November 3, 1994 367

INDEX – Continued

Page

District Court's Order Certifying Appeal as Frivolous, EOD November 7, 1994 ..... Pet. App. 8a

Plaintiff/Appellee's Motion to Dismiss Appeal, EOD November 9, 1994..... 373

Defendant/Appellant's Opposition to Motion to Dismiss Appeal, EOD November 14, 1994..... 384

Plaintiff/Appellee's Reply in Support of Motion to Dismiss Appeal, dated November 16, 1994 415

Court of Appeals' Order Dismissing Appeal, EOD November 17, 1994 ..... Pet. App. 1a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES[1]

Entry Date	Event
2/17/89	Action Commenced;
2/23/89	First Amendment Complaint of Robert J. Pelletier For Constitutional Violations, Violation of the Administrative Procedure Act, Violation of the Privacy Act, Intentional Interference with Contractual Advantage and Inducement to Breach of Contract, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Negligence;
4/10/89	Ex Parte Application of John W. Behrens Asserting Immunity from Discovery Pending a Ruling on Immunity from Suit;
4/12/89	Opposition of Robert J. Pelletier to Ex Parte Application of Defendant John Behrens re Immunity from Discovery;
4/19/89	Order of Magistrate Kronenberg Staying Discovery as to Defendant John W. Behrens Until There Has Been a Ruling by the Trial Judge on Defendant Behrens' Entitlement of Official Immunity from this Suit;
4/26/89	Objection of Robert J. Pelletier to Magistrate Kronenberg's 4/19/89 Order;
5/5/89	Memorandum of John Behrens in Opposition to Robert Pelletier's Objections to Magistrate's 4/19/89 Order;

[1] All relevant docket entries are in the United States District Court Central District of California unless otherwise noted.

5/16/89	Notice of Motion and Motion of Defendant Behrens to Dismiss the First Amended Complaint or for Summary Judgment;
6/12/89	Opposition of Robert J. Pelletier to Motion of Defendant John W. Behrens to Dismiss or for Summary Judgment;
7/10/89	Reply Memorandum in Support of Defendant John W. Behrens' Motion to Dismiss the First Amended Complaint or For Summary Judgment;
7/18/89	Consolidated Rejoinders of Robert J. Pelletier to Reply Briefs of John W. Behrens, etc.;
8/8/89	Supplemental Memorandum in Support of Defendant John W. Behrens' Motion to Dismiss or for Summary Judgment;
8/15/89	Response of Robert J. Pelletier to Supplemental Memorandum of John W. Behrens to Dismiss or for Summary Judgment;
9/11/89	Order of District Judge Takasugi Vacating Magistrate Kronenberg's 4/19/89 Order Staying Discovery as to Defendant Behrens;
10/5/89	Order of District Judge Takasugi Granting in Part and Denying in Part Motions to Dismiss;
10/30/89	Answer to First Amended Complaint by Defendant John W. Behrens;
11/2/89	Defendant John W. Behrens' Notice of Appeal (appealing 9/11/89 and 10/6/89 orders);
2/5/90	[United States Court of Appeals Ninth Circuit] Motion of the Appellant for a Stay of

	District Court Orders (9/11/89 and 10/6/89) Pending Appeal to This Court;
2/13/90	[United States Court of Appeals Ninth Circuit] Pelletier's Memorandum of Points and Authorities in Opposition to Behrens' Motion for a Stay of Orders;
3/6/90	[United State Court of Appeals Ninth Circuit] Brief for Federal Defendant Behrens;
3/14/90	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Wallace and Leavy Denying Appellant's Motion to Stay;
4/17/90	[United States Court of Appeals Ninth Circuit] Brief of Appellee Robert J. Pelletier;
5/1/90	[United States Court of Appeals Ninth Circuit] Reply Brief for Federal Defendant Behrens;
4/4/91	[United States Court of Appeals Ninth Circuit] Argued and Submitted;
5/2/91	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Remanding to District Court for Limited Purpose);
10/8/91	Order of District Judge Takasugi re Substitution of United States for Defendant John W. Behrens;
1/6/92	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Reinstating Appeal);
1/17/92	Order of District Judge Takasugi Denying Motion for Stay Pending Appeal (of Defendant Behrens);

1/24/92	[United States Court of Appeals Ninth Circuit] Motion of Appellant for a Stay of District Court Trial Proceedings Until This Court Issues a Ruling on the Immunity Issues in this Appeal;
1/28/92	[United States Court of Appeals Ninth Circuit] Supplemental Brief of Federal Appellant Behrens;
1/29/92	[United States Court of Appeals Ninth Circuit] Appellee Pelletier's Memorandum in Opposition to Appellant Behrens' Motion for Stay, etc.;
1/31/92	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge King (Staying Proceedings in District Court);
2/10/92	[United States Court of Appeals Ninth Circuit] Supplemental Brief of Appellee Robert J. Pelletier;
2/19/92	[United States Court of Appeals Ninth Circuit] Supplemental Reply Brief for Federal Appellant Behrens;
6/29/92	[United States Court of Appeals Ninth Circuit] Opinion, Pelletier v. Federal Home Loan, 968 F.2d 865;
8/12/92	[United States Court of Appeals Ninth Circuit] Petition for Panel Rehearing (by Appellant Behrens);
9/24/93	[United States Court of Appeals Ninth Circuit] Order of Circuit Judges Schroeder and Reinhardt and District Judge Kind (Denying Petition for Rehearing);

2/22/94	Notice of Motion and Motion of Plaintiff Robert J. Pelletier to Modify this Court's 10/6/91 Order in Light of Ninth Circuit Opinion and for Sanctions;
3/1/94	Defendant Behrens' Notice of Motion and Motion for Summary Judgment;
3/11/94	Stipulation Regarding Ninth Circuit Decision and [Proposed] Order Thereon;
3/14/94	Plaintiff Pelletier's Memorandum of Points and Authorities in Opposition to Defendant Behrens' Motion for Summary Judgment, etc.;
3/21/94	Reply to Plaintiff's Opposition to Defendant Behrens' Motion for Summary Judgment;
8/1/94	Order of District Judge Takasugi Continuing Pre-Trial Conference (to 12/5/94) and Trial (to 1/10/95);
9/6/94	Order of District Judge Takasugi re Motions to Extend Discovery Cutoff, Modify, Reconsider, and Strike, and for Summary Judgment and Clarification;
10/24/94	Defendant John W. Behrens' Notice of Appeal, etc. (from 9/7/94 Order);
10/27/94	Order of District Judge Takasugi Vacating Order of April 19, 1994, (and Notifying the Parties that the Court expected Compliance with Local Pre-Trial Conference Requirements);
10/31/94	Ex Parte Application of John W. Behrens for Order Vacating Order Entered on October 27, 1994;
11/1/94	Ex Parte Application of Plaintiff Robert J. Pelletier for Order Striking Purported

	Notice of Appeal and Ex Parte Application of Christine A. Murphy as Violating Local Rule 2 and for An Order Certifying any such Purported Appeal as Frivolous and as Violating the Mandate of the Ninth Circuit Court of Appeals;
11/1/94	Opposition of Plaintiff Robert J. Pelletier to Ex Parte Application to Vacate October 27, 1994 Order;
11/3/94	Opposition of John W. Behrens to Plaintiffs' Ex Parte Application to Strike, etc.;
11/7/94	Order of District Judge Takasugi Certifying Appeal as Frivolous;
11/9/94	[United States Court of Appeals Ninth Circuit] Appellant John W. Behrens' Emergency Motion Under Circuit Rule 27-3 for Stay of Trial Court Proceedings Pending [Ninth Circuit]'s Disposition of Motion to Dismiss Appeal;
11/9/94	[United States Court of Appeals Ninth Circuit] Motion of Plaintiff and Appellee Robert J. Pelletier to Dismiss Appeal and for Award of Sanctions;
11/14/94	[United States Court of Appeals Ninth Circuit] Opposition of Plaintiff and Appellee Robert J. Pelletier to Emergency Motion of Behrens for Temporary Stay, etc.;
11/14/94	[United States Court of Appeals Ninth Circuit] Appellant's Opposition to Motion to Dismiss Appeal;
11/17/94	[United States Court of Appeals Ninth Circuit] Order of Chief Judge Wallace and Circuit Judges Goodwin and Norris (dismissing appeal and denying stay motions);

PLAINTIFF'S FIRST AMENDED COMPLAINT, EOD FEBRUARY 23, 1989*

ORIGINAL

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA, Defendants.	Case No. CV 89-0969 WJR (KX) FIRST AMENDED COMPLAINT OF ROBERT J. PELLETIER FOR: CONSTITUTIONAL VIOLATIONS; VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT; VIOLATION OF THE PRIVACY ACT; INTENTIONAL INTERFERENCE WITH CONTRACTUAL ADVANTAGE AND INDUCEMENT TO BREACH OF CONTRACT; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;

* Any typographical and/or incorrect punctuation found in the following Joint Appendix pages were left intentionally to show accurately how the original documents appeared.

) NEGLIGENT INFLICTION
) OF EMOTIONAL DISTRESS;
) NEGLIGENCE
)
) DEMAND FOR JURY TRIAL
)

Robert J. Pelletier ("Pelletier"), alleges as follows:

GENERAL ALLEGATIONS

1. Pelletier is an individual presently residing in Riverside County, California, and formerly residing in Orange County, California during the time when many of the allegations set forth in this Complaint occurred. Pelletier has been named as a defendant by the Federal Savings and Loan Insurance Corporation ("FSLIC") in actions arising following the FSLIC's placement of Beverly Hills Savings and Loan Association into a Federal receivership. Those actions are pending before Judge Takasugi in Case No. CV 88-00651 RMT (Tx), as removed and amended, and in FSLIC's complaint for damages Case No. CV 86-6780-RMT (Tx) (collectively the "FSLIC Actions").

2. Defendant Federal Home Loan Bank Board is an agency of the Executive Branch of Defendant United States of America (collectively the "Bank Board").

3. Defendant Federal Home Loan Bank of San Francisco ("FHLBSF") is incorporated under and pursuant to the laws of the United States of America and has its principal place of business in San Francisco, California. Pelletier is informed and believes and on that basis alleges that at times material hereto FHLBSF acted as an agent, servant or representative of the Bank Board.

4. Defendant John W. Behrens ("Behrens") is an officer or employee of the FHLBSF. Pelletier is informed and

believes and on that basis alleges that Behrens resides in or about Solano County, California.

5. Jurisdiction exists by virtue of 28 U.S.C. § 1331; 5 U.S.C. § 552a(g)(1); 5 U.S.C. § 702; 12 U.S.C. §§ 1431 and 1437, and 28 U.S.C. §§ 2201 and 2202, and pendant jurisdiction.

6. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391.

7. At times material to the allegations of this Complaint, Pelletier is informed and believes and on that basis alleges, that in performing the acts alleged in this Complaint Behrens acted either individually or as the agent, servant, employee and/or representative of FHLBSF, of the Bank Board, of the Federal Savings and Loan Insurance Corporation (the "FSLIC"), or of two or more of these entities, in the course and scope of such relationships.

8. Pelletier is informed and believes and on that basis alleges that in performing the actions alleged in this Complaint, the FHLBSF, the Bank Board, and the FSLIC were, at various, undefined, but relevant times, acting as the agents of one another, and were acting within the course and scope of that relationship.

9. Pelletier has pursued a profession and held employment in the savings and loan industry in various executive positions for over thirty years. Commencing in 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He remained at BHSL until March of 1984. For much of his term of employment at

BHSL, Pelletier served as head of the Major Loan Division of BHSL. The Major Loan Division was responsible only for the origination, processing, and closing of income property loans (commercial and industrial real estate loans).

10. Pelletier was also a member of the Senior Loan Committee. As a member of the Senior Loan Committee, he reviewed, evaluated and approved various types of loans then being made by BHSL in dollar amounts which were in excess of limitations and criteria promulgated and approved by the BHSL Board of Directors and its legal advisors. Pelletier is informed and believes and on that basis alleges that all loans which he approved while a member of the Senior Loan Committee met the criteria set forth by the Board and its advisors.

11. Pelletier was never a member of the BHSL Board of Directors.

12. In March of 1984, Pelletier was instructed by BHSL to relocate his office from BHSL's Mission Viejo Administrative Headquarters in Orange County, California to BHSL's Corporate Headquarters in Beverly Hills, approximately 50 miles to the north. Pelletier was not inclined to make such a move since most of his professional and personal contacts were centered in Orange County.

13. Approximately two weeks after BHSL advised Pelletier of the proposed transfer, Pelletier met with the BHSL CEO to discuss the matter. At that time, Pelletier advised the CEO that he had decided to voluntarily resign his position rather than agree to the relocation.

14. Following this voluntary withdrawal from BHSL in mid-1984, Pelletier became employed as managing officer at Equitable Savings and Loan Association, also in Orange County. At the time, Equitable was being operated under the supervision of the FHLBSF.

15. Pelletier's employment as managing officer at Equitable was approved by the FHLBSF, by and through its agents, and by the California Department of Savings and Loan.

16. Pelletier was employed as managing officer at Equitable until Equitable's management decided to transfer its main offices to Northern California. Pelletier again declined such relocation, and resigned his position at Equitable.

17. Subsequently, Pelletier was hired as President of Pioneer Savings and Loan Association. Once again, Pelletier's work was well-received by FHLBSF and State regulators. Pelletier's work was also well-received by Pioneer's owners, as well as by the independent accounting firm of Peat, Marwick, Mitchell & Company.

18. Pioneer was required, however, to obtain the approval of its employment of Pelletier as President by the FHLBSF. The FHLBSF delayed giving Pelletier its approval or disapproval for a material period of time.

19. During the time period that Pelletier was at Pioneer, Pelletier voluntarily met with regulators and others investigating the problems that had ultimately surfaced at BHSL. Pelletier met on many occasions with

regulators and their counsel, and travelled back to Washington, D.C., to provide them with facts regarding Pelletier's division and the Senior Loan Committee.

20. Pelletier was told by those regulators with whom he met that no action would be taken to prejudice his employment with Pioneer until after the FSLIC investigation had been completed.

21. In May of 1986, Behrens sent a letter (the "Behrens Directive") to Pioneer's Board of Directors directing the Board to terminate Pelletier as its President. Following its receipt of the Behrens Directive, Pioneer's Board of Directors told Pelletier that Pioneer was under direction from the FHLBSF to terminate and replace him. When Pelletier refused the Board's request that he voluntarily resign, the Board of Directors of Pioneer terminated him. Prior to the Behrens Directive, no one from Defendant FHLBSF, nor Defendant Behrens, ever advised Pelletier that his employment with Pioneer was in jeopardy.

22. The first of the FSLIC Actions naming Pelletier was not filed until November of 1986, or six months after the Behrens Directive was issued.

23. Pelletier has exhausted all administrative remedies available to him. Defendants have denied Pelletier any administrative remedy, in spite of his efforts to obtain such a remedy. Defendants failed to hold any administrative hearings or even discuss with Pelletier the reasons for the Behrens Directive. Defendants have not provided Pelletier with any further explanation regarding the reasons behind the Behrens Directive. Defendants refused and failed to afford Pelletier with any meaningful opportunity to be heard regarding the charges against

him, and have not allowed Pelletier the opportunity to clear his name. Defendants have refused and failed to act in compliance with their own internal investigatory procedures to provide Pelletier with a full and fair hearing and investigation into his claims.

24. Since his termination by Pioneer at the direction of the Defendants, Pelletier, a man in his prime earning years, has been unable to secure other employment in the savings and loan and the financial institutions industries. Several senior level jobs have been tentatively offered to him only to be withdrawn after learning of the Behrens Directive and its impact upon Pelletier's employment at Pioneer.

25. Pelletier is informed and believes and on that basis alleges that Defendants, and each of them, have made and continue to make a concerted effort to prevent Pelletier from securing employment in the financial institutions industry.

26. Pelletier is informed and believes and on that basis alleges that the Defendants have acted in concert with each other, and with others, and have prevented and continue to prevent him from securing any gainful employment in the savings and loan and related financial institutions industries.

27. Defendants' actions have created, and continue to create, a false and damaging impression about Pelletier in the savings and loan industry with respect to Pelletier's abilities, his performance and his honesty.

28. Pelletier is informed and believes and on that basis alleges that no other officer or director of BHSL has

lost his employment or professional career because of regulatory action and no other BHSL officer or director has been the subject of any order similar to the Behrens Directive. Pelletier is further informed and believes and on that basis alleges that others named by the FSLIC in their action arising out of the BHSL seizure in fact were retained as employees of BHSL through 1988.

FIRST CLAIM FOR DENIAL OF DUE PROCESS

29. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28 of his General Allegations.

30. This is a claim for damages and equitable relief for Defendants' violations of Pelletier's Constitutional and statutory due process rights.

31. In issuing the Behrens Directive, Defendants failed to afford Pelletier his procedural due process rights to have a pre- or post-termination hearing or have any impartial hearing regarding the Defendants' allegations and failed to permit Pelletier the opportunity to refute any claims or adverse information against him, all in violation of his Constitutional and civil rights, as well as procedural rights afforded to him under and pursuant to the regulations and statutes applicable to the Defendants' exercise of their regulatory and investigative duties.

32. Defendants arbitrarily and capriciously acted in violation of Pelletier's due process rights as guaranteed by the Fifth Amendment to the United States Constitution and pertinent statutes by acting in each and all of the

following ways, *inter alia:*, (a) directing Pioneer to terminate Pelletier's employment at Pioneer without meaningfully and thoroughly investigating Pelletier's involvement with BHSL and his performance at Pioneer; (b) failing to interview knowledgeable witnesses; (c) refusing to provide Pelletier with any opportunity to refute before an impartial tribunal any adverse information against him; (d) relying on false information; (e) refusing to allow Pelletier any opportunity to confront the witnesses, if any exist, who provided evidence against him, and to examine any documents, if any exist, containing evidence adverse to him; (f) failing to allow Pelletier any appeal rights regarding the actions taken against him; and (g) continuing to act adversely to Pelletier in spite of their disregard of his procedural due process rights.

33. In acting as hereinabove alleged, Defendants violated Pelletier's procedural due process rights as guaranteed by the Fifth Amendment to the United States Constitution. In addition, Defendants' conduct has also deprived Pelletier of his statutory rights established in, *inter alia*, 12 U.S.C. § 1730(g) and 1464(d).

34. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

35. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's Constitutional and statutory rights.

SECOND CLAIM FOR VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS

36. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, and paragraphs 31 through 34, of his Complaint.

37. This is a claim for damages and equitable relief for Defendants' violations of Pelletier's Constitutional liberty and property rights.

38. As a direct and proximate result of Defendants' actions as hereinabove alleged, Pelletier has been deprived, and continues to be deprived, of clearly established and Constitutionally protected property and liberty rights including, without limitation, his rights to specific employment and to pursue his profession free from undue governmental interference. Pelletier, as a direct and proximate result of Defendants' actions, has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

39. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's constitutional rights.

THIRD CLAIM FOR VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

40. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34 and 38 of this Complaint.

41. This is a claim for damages and equitable relief for Defendants' violations of the Administrative Procedure Act.

42. In failing to perform a careful and diligent investigation of Pelletier's qualifications, Defendants' actions were unconstitutional, arbitrary, capricious, and an abuse of their lawful discretion in violation of 5 U.S.C. § 701-706 (the Administrative Procedure Act ("APA")), 12 U.S.C. § 1730(b), (e) and (g) (the National Housing Act), 12 U.S.C. § 1464(d) (the Home Owners Loan Act), and related federal regulations.

43. Pelletier has sought to exercise his administrative remedies under the APA but Defendants have refused to respond in any way to his effort and have thereby denied him any administrative remedy.

44. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

45. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's rights under and pursuant to the APA.

FOURTH CLAIM FOR VIOLATION OF 5 U.S.C. § 552a (THE PRIVACY ACT)

46. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, and 42 through 44 of his Complaint.

47. This is a claim for damages and equitable relief for Defendants' violations of the Privacy Act.

48. In failing and refusing to compile and maintain records concerning Pelletier with such accuracy, relevance, timeliness, and completeness as necessary to assure fairness in the determination of Pelletier's qualifications, character, rights, and the opportunities of, and benefits of, Third-Party Defendants have violated 5 U.S.C. § 552a(g)(1)(B) and (C) and (g)(4) of the Privacy Act (5 U.S.C. § 552a et seq.). These failures and refusals are ongoing.

49. Pelletier has sought to exercise his administrative remedies but in all efforts rebuffed and he has been denied any remedy by Defendants.

50. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional distress, pain and suffering, stigma, and damage to his reputation.

51. Defendants' actions have at all times been willful, malicious, in bad faith and in reckless disregard of Pelletier's rights under and pursuant to the Privacy Act.

FIFTH CLAIM FOR INTERFERENCE WITH CONTRACTUAL RIGHTS AND INDUCING BREACH OF CONTRACT

52. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44 and 48 through 50 of his Complaint.

53. This is a pendant state tort claim for interference with contractual rights and and prospective advantage.

54. Prior to May 6, 1986, Pelletier had entered into an employment contract with Pioneer whereby Pelletier

agreed to serve as President and Managing Officer for Pioneer, and Pioneer agreed to pay to Pelletier compensation for Pelletier's work in those capacities.

55. Pelletier and Pioneer in fact performed in accordance with their contractual obligations, until Pioneer received the Behrens Directive from Defendants dated May 6, 1986.

56. At all relevant times, Defendants had full knowledge of the employment contract between Pelletier and Pioneer. In spite of such knowledge, without good cause therefore, and with specific intent to interfere with the contractual relationship between Pelletier and Pioneer, Defendants induced and wrongfully caused Pioneer to terminate Pelletier and to disaffirm and deny to Pelletier all rights under the employment contract.

57. As a direct and proximate result of Defendants' actions, Pelletier has experienced economic loss, unemployment, emotional pain and suffering, stigma, and damage to his reputation.

58. Defendants' intentional acts of interference and inducing Pioneer to breach its employment contract with Pelletier at all times were willful, malicious and in bad faith.

SIXTH CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

59. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 of his Complaint.

60. This is a pendant state tort claim for intentional infliction of emotional distress.

61. The conduct of, *inter alios,* Defendant Behrens was malicious and intentional and done for the purpose of causing Pelletier to suffer humiliation, mental anguish, and emotional and physical distress. Defendants' conduct was done with the knowledge that Pelletier's emotional and physical distress would thereby increase and was done with a wanton and reckless disregard of the consequences to Pelletier.

62. As the proximate result of the aforementioned acts, Pelletier suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind and body.

63. The aforementioned acts of Defendants were wilful, wanton, malicious, and oppressive and justify the awarding of exemplary and punitive damages.

SEVENTH CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

64. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 of this Complaint.

65. This is a pendant state tort claim for negligent infliction of emotional distress.

66. In acting as alleged above, Defendants failed to exercise due care. Defendants knew or should have known that their failure to exercise due care in acting as

alleged above would cause Plaintiff severe emotional distress.

67. As a proximate result of Defendants' breaches of their duty of due care to Pelletier, they caused Pelletier to suffer humiliation, mental anguish, and emotional and physical distress.

68. As the proximate result of the aforementioned acts, Pelletier suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind and body.

EIGHTH CLAIM FOR NEGLIGENCE

69. Pelletier incorporates by this reference the allegations set forth in paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, 54 through 57, and 66 of this Complaint.

70. This is a claim for relief for Defendants' negligence which has caused Pelletier injury.

71. By acting as set forth above, Defendants, and each of them, failed and neglected to exercise due care and diligence in performing their duties and obligations to Pelletier.

72. By acting as set forth above, Defendants and each of them were negligent and grossly negligent and breached their duties and obligations under state and federal law to Pelletier.

73. As a proximate result of such negligence and gross negligence, Pelletier has suffered damages in an amount that is not yet fully ascertained but which is in

excess of $50,000. Pelletier will seek leave to amend this Complaint to state the amount of these damages as soon as they are determined with sufficient certainty and, if appropriate, to specify with more particularity the extent to which each of the Defendants is responsible for the particular items of damages suffered by Pelletier.

74. In committing the acts and omissions alleged above, Defendants acted with a conscious and reckless disregard for Pelletier. Therefore, in addition to actual damages, and to the extent available against any given Defendant, Pelletier is entitled to recover punitive damages from Defendants, as appropriate, in the amount of $10 million for the purpose of punishing those Defendants and deterring them from engaging in such outrageous actions in the future.

WHEREFORE, Pelletier respectfully prays that upon final hearing, this Court:

1. Issue a declaration that Defendants' actions deprived Pelletier of property and liberty interests in violation of Pelletier's substantive and procedural due process rights as guaranteed by the Fifth Amendment to the United States Constitution;

2. Issue a declaration that Defendants' actions were arbitrary and capricious and violated Pelletier's rights under the Administrative Procedure Act, the Privacy Act, the Homeowners Loan Act, and the National Housing Act;

3. Issue preliminary and permanent injunctive relief prohibiting Defendants from interfering in any way with Pelletier's efforts to find and hold employment;

4. Issue preliminary and permanent injunctive relief mandating that Defendants grant Pelletier an opportunity to examine, confront and refute any allegations, evidence and witnesses against him, and further, mandating that Defendants hold a name clearing hearing for Pelletier, and further, prohibiting Defendants from further interfering with Pelletier's rights to confront his accusers and obtain a fair, impartial and due process hearing on Defendants' allegations against him;

5. Award Pelletier actual and exemplary damages, as appropriate in accordance with the applicable federal and state laws, for each of his claims as appropriate;

6. Award Pelletier attorneys' fees and costs, as appropriate; and

7. Award Pelletier such other and further relief as this Court may deem just and proper.

DATED: February 23, 1989

REBECCA BONANNO MOCCIARO,
a P.C.
SAMUEL T. REES, a P.C.
LEFF KATZ REES & MOCCIARO

By: /s/ Rebecca B. Mocciaro
Rebecca Bonanno Mocciaro
Attorneys for Plaintiff
ROBERT J. PELLETIER

DEMAND FOR JURY TRIAL

Please take notice that plaintiff Robert J. Pelletier hereby demands trial by jury.

DATED: February 23, 1989

REBECCA BONANNO MOCCIARO,
a P.C.
SAMUEL T. REES, a P.C.
LEFF KATZ REES & MOCCIARO

By: /s/ Rebecca B. Mocciaro
Rebecca Bonanno Mocciaro
Attorneys for Plaintiff
ROBERT J. PELLETIER

DISTRICT COURT'S ORDER VACATING ORDER STAYING DISCOVERY, EOD SEPTEMBER 11, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-0969-RMT(Kx) ORDER VACATING MAGISTRATE'S ORDER STAYING DISCOVERY (Filed Sep. 11, 1989)

This matter has come before the court on the objections of plaintiff to Magistrate Kronenberg's April 19, 1989 order on ex parte application of defendant Behrens for immunity from discovery. Having considered the pleadings and other documents filed herein, the court has determined that although defendant Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented. Accordingly,

IT IS ORDERED that Magistrate Kronenberg's April 19, 1989 order staying discovery as to defendant Behrens is hereby vacated.

Dated: September 11, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

DISTRICT COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS, EOD OCTOBER 5, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-969-RMT(Kx) ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS (Filed Oct. 5, 1989)

This matter has come before the court on the following motions:

(1) Motion by defendant Federal Home Loan Bank Board ("FHLBB") to dismiss the first amended complaint,

(2) Motion by defendant United States of America to dismiss the first amended complaint,

(3) Motion by defendant Federal Home Loan Bank of San Francisco ("FHLB-SF") to dismiss the first amended complaint, and

(4) Motion by defendant John W. Behrens to dismiss the first amended complaint or for summary judgment.

Having considered the pleadings and other documents filed herein, the court has determined the following:

1. The statute of limitations for a *Bivens* claim, intentional infliction of emotional distress, and negligent infliction of emotional distress is one year;

2. Sovereign immunity bars a *Bivens* claim against the U.S.A. and the FHLBB;

3. Injunctive relief is available under the Administrative Procedure Act; monetary relief is not;

4. A Privacy Act claim is only authorized against a government agency;

5. A federal agency, such as the FHLBB is not a proper party defendant to a Federal Tort Claims Act ("FTCA") claim;

6. Claims arising out of interference with contract rights are excluded by the FTCA; and

7. Given the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment.

Accordingly,

IT IS ORDERED that the motions to dismiss are granted in part and denied in part as follows:

1. As to the first and second causes of action alleging *Bivens* claims,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged

subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are granted, as barred by sovereign immunity.

2. As to the third cause of action alleging an Administrative Procedure Act claim, the motions to dismiss of all defendants is granted to the extent plaintiff seeks monetary relief and denied to the extent plaintiff seeks injunctive relief.

3. As to the fourth cause of action alleging a Privacy Act claim,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are denied.

4. As to the fifth cause of action alleging intentional interference with contractual rights and inducing breach of contract,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are denied;

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim; and

(c) The motion to dismiss of defendant U.S.A. is granted, as this claim is excluded from the FTCA.

5. As to the sixth and seventh causes of action alleging intentional and negligent infliction of emotional distress,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment,

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim, and

(c) The motion to dismiss of defendant U.S.A. is denied.

6. As to the eighth cause of action alleging a negligence claim,

(a) The motions to dismiss of defendants Behrens, FHLB-SF and U.S.A. are denied, and

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim.

7. The alternative motion of defendant Behrens for summary judgment is denied without prejudice.

Dated: October 5, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

DEFENDANT'S ANSWER, EOD OCTOBER 30, 1989

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. **FEDERAL HOME LOAN BANK of SAN FRANCISCO,** et al., Defendants.	No. CV 89-0969 RMT (Kx) **DEFENDANT JOHN W. BEHRENS' ANSWER TO FIRST AMENDED COMPLAINT**

Defendant John W. Behrens, in his individual capacity, for his answer to the First Amended Complaint ("Complaint"), hereby states as follows.

First Defense

The Complaint fails to state a claim against Behrens upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of this action.

Third Defense

The Complaint is barred by the statute of limitations.

Fourth Defense

Insofar as plaintiff seeks equitable relief, the Complaint cannot be maintained against Behrens personally.

Fifth Defense

Behrens is absolutely and qualifiedly immune from personal liability for monetary damages.

Sixth Defense

The exclusive remedy for the injuries and/or damages alleged in the Complaint lies against the United States, not against Behrens personally.

Seventh Defense

The injuries and/or damages alleged in the Complaint were not proximately caused by a negligent or wrongful act or omission of Behrens.

Eighth Defense

The injuries and/or damages alleged by the plaintiff were proximately caused by the intervening or superseding act of one other than Behrens.

Ninth Defense

At all times relevant to the acts alleged in the Complaint, Behrens acted in good faith and with a reasonable belief in the lawfulness of his acts.

Tenth Defense

Behrens' actions were privileged.

Eleventh Defense

Behrens owed no duty to plaintiff.

Twelfth Defense

Behrens breached no duty owed to plaintiff.

Thirteenth Defense

The injuries and/or damages alleged in the Complaint were caused by plaintiff himself.

Fourteenth Defense

The Complaint is barred by laches.

Fifteenth Defense

The Complaint is barred by plaintiff's contributory negligence.

Sixteenth Defense

The Complaint is barred by plaintiff's comparative negligence.

Seventeenth Defense

Plaintiff failed to mitigate his damages.

Eighteenth Defense

Plaintiff cannot recover for the injuries and/or damages alleged in the Complaint because of his unclean hands.

Nineteenth Defense

Behrens answers the numbered paragraphs of the Complaint as follows using the same paragraph numbers:

1. Admits on information and belief that Robert J. Pelletier is an individual who has been named as a defendant in two lawsuits being pursued by the Federal Savings and Loan Insurance Corporation ("FSLIC") based on Pelletier's involvement in the collapse of Beverly Hills Savings & Loan Association ("BHSL"). Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of this paragraph, and therefore denies the same.

2. Admits to the extent consistent with the statutes creating the Federal Home Loan Bank Board ("Bank Board").

3. Admits the first sentence to the extent it is consistent with law; otherwise, denies. Denies the second sentence.

4. As to the first sentence, admits that at relevant times and until the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, Behrens was an employee of the Federal Home Loan Bank of San Francisco ("FHLB-SF"). Admits the second sentence.

5. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

6. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

7. Admits that at all relevant times, Behrens acted as the agent, servant, employee and representative of the Bank Board and/or of the FSLIC, in the course and scope of such relationships; otherwise denies.

8. Denies.

9. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

10. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

11. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

12. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

13. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

14. Denies specifically that Equitable Savings and Loan Association was operated under the supervision of the FHLB-SF. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

15. Denies specifically that plaintiff's employment as managing officer of Equitable Savings and Loan Association was approved by the FHLB-SF and/or its agents. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

16. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

17. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

18. Denies.

19. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

20. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

21. As to the first sentence, admits that on May 8, 1986, acting in his capacity as Supervisory Agent of Pioneer Savings & Loan Association ("Pioneer"), Behrens sent a letter to Pioneer's board of directors; denies the remaining allegations of the first sentence. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore denies the same.

22. Denies.

23. As to the first sentence, avers that this sentence contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies. As to the third sentence, admits that no formal adversarial hearing was held in connection with the May 8, 1986, letter to Pioneer, but denies the implication that plaintiff was entitled to such a hearing; and denies the remainder of this sentence. Denies all the remaining allegations of this paragraph.

24. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph, and therefore denies the same.

25. Denies.

26. Denies.

27. Denies.

28. Behrens is without knowledge or information sufficient to form a belief as to the truth or falsity of the

allegations in this paragraph, and therefore denies the same.

29. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28 above.

30. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

31. Denies.

32. Denies.

33. Denies.

34. Denies.

35. Denies.

36. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28 and 31 through 34 above.

37. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

38. Denies.

39. Denies.

40 through 51. These paragraphs require no answer because they relate to claims against Behrens which have been dismissed by the court's order of October 6, 1989; but insofar as an answer may be deemed required, denies.

52. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, and 48 through 50 above.

53. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

54. Denies.

55. Denies.

56. Denies.

57. Denies.

58. Denies.

59. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 above.

60. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

61. Denies.

62. Denies.

63. Denies.

64. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, and 54 through 57 above.

65. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

66. Denies.

67. Denies.

68. Denies.

69. Behrens incorporates by this reference his answer as set forth in response to paragraphs 1 through 28, 31 through 34, 38, 42 through 44, 48 through 50, 54 through 57, and 66 above.

70. This paragraph contains conclusions of law and not allegations of fact to which an answer is required; but insofar as an answer may be deemed required, denies.

71. Denies.

72. Denies.

73. Denies.

74. Denies.

Behrens denies all of plaintiff's prayers for relief.

Behrens hereby specifically denies each and every allegation of the Complaint not otherwise answered above.

Behrens demands a jury trial on all issues.

WHEREFORE, having fully answered, Behrens prays that the plaintiff take nothing, that the First Amended Complaint be dismissed with prejudice, and that the Court grant judgment in favor of Behrens and award him

the costs of this action, and make such other orders as may be just and appropriate.

Respectfully submitted,

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United States Attorney

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DEFENDANT'S NOTICE OF APPEAL, EOD NOVEMBER 2, 1989

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. **FEDERAL HOME LOAN BANK of SAN FRANCISCO, et al.,** Defendants.	No. CV 89-0969 RMT (Kx) **DEFENDANT JOHN W. BEHRENS' NOTICE OF APPEAL**

Notice is hereby given that John W. Behrens, defendant in this action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from this Court's orders (a) permitting discovery to proceed and (b) denying in part Behrens' motion to dismiss or for summary judgment. Copies of the two orders appealed from, which were entered in this action on September 11, 1989, and October 6, 1989, respectively, are attached.

In accordance with Local Rule 17, Behrens hereby advises the Court that the other parties to this action and their counsel of record are as follows:

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Defendant Federal Home Loan Bank of San Francisco

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and

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Defendant Office of Thrift Supervision (formerly the Federal Home Loan Bank Board)

Counsel: Steven W. Dimmick
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Defendant The United States of America

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-0969-RMT(Kx) ORDER VACATING MAGISTRATE'S ORDER STAYING DISCOVERY (Filed September 11, 1989)

This matter has come before the court on the objections of plaintiff to Magistrate Kronenberg's April 19, 1989 order on ex parte application of defendant Behrens for immunity from discovery. Having considered the

pleadings and other documents filed herein, the court has determined that although defendant Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented. Accordingly,

IT IS ORDERED that Magistrate Kronenberg's April 19, 1989 order staying discovery as to defendant Behrens is hereby vacated.

Dated: September 11, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	No. CV 89-969-RMT(Kx) ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS (Filed October 5, 1989)

This matter has come before the court on the following motions:

(1) Motion by defendant Federal Home Loan Bank Board ("FHLBB") to dismiss the first amended complaint,

(2) Motion by defendant United States of America to dismiss the first amended complaint,

(3) Motion by defendant Federal Home Loan Bank of San Francisco ("FHLB-SF") to dismiss the first amended complaint, and

(4) Motion by defendant John W. Behrens to dismiss the first amended complaint or for summary judgment.

Having considered the pleadings and other documents filed herein, the court has determined the following:

1. The statute of limitations for a *Bivens* claim, intentional infliction of emotional distress, and negligent infliction of emotional distress is one year;

2. Sovereign immunity bars a *Bivens* claim against the U.S.A. and the FHLBB;

3. Injunctive relief is available under the Administrative Procedure Act; monetary relief is not;

4. A Privacy Act claim is only authorized against a government agency;

5. A federal agency, such as the FHLBB is not a proper party defendant to a Federal Tort Claims Act ("FTCA") claim;

6. Claims arising out of interference with contract rights are excluded by the FTCA; and

7. Given the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment.

Accordingly,

IT IS ORDERED that the motions to dismiss are granted in part and denied in part as follows:

1. As to the first and second causes of action alleging *Bivens* claims,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment, and
>
> (b) The motions to dismiss of defendants FHLBB and U.S.A. are granted, as barred by sovereign immunity.

2. As to the third cause of action alleging an Administrative Procedure Act claim, the motions to dismiss of all defendants is granted to the extent plaintiff seeks monetary relief and denied to the extent plaintiff seeks injunctive relief.

3. As to the fourth cause of action alleging a Privacy Act claim,

> (a) The motions to dismiss of defendants Behrens and FHLB-SF are granted, and

(b) The motions to dismiss of defendants FHLBB and U.S.A. are denied.

4. As to the fifth cause of action alleging intentional interference with contractual rights and inducing breach of contract,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are denied;

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim; and

(c) The motion to dismiss of defendant U.S.A. is granted, as this claim is excluded from the FTCA.

5. As to the sixth and seventh causes of action alleging intentional and negligent infliction of emotional distress,

(a) The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment,

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim, and

(c) The motion to dismiss of defendant U.S.A. is denied.

6. As to the eighth cause of action alleging a negligence claim,

(a) The motions to dismiss of defendants Behrens, FHLB-SF and U.S.A. are denied, and

(b) The motion to dismiss of defendant FHLBB is granted, as the FHLBB is not a proper party defendant to a FTCA claim.

7. The alternative motion of defendant Behrens for summary judgment is denied without prejudice.

Dated: October 5, 1989

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

[Certificate Of Service Omitted In Printing]

DEFENDANT/APPELLANT'S MOTION FOR STAY, EOD FEBRUARY 5, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

MOTION OF THE APPELLANT FOR A STAY OF DISTRICT COURT ORDERS PENDING APPEAL TO THIS COURT

Pursuant to Rules 8 and 27, Federal Rules of Appellate Procedure, and Rule 7(h) of this Court, the appellant, John W. Behrens, a Supervisory Agent of the Federal Home Loan Bank Board ("Board") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), respectfully requests a stay of the orders of the district court entered on September 11, 1989 and October 6, 1989, pending appeal to the Ninth Circuit.

The lower court orders, which are attached to this motion, require Mr. Behrens to submit to discovery and trial in his qualified immunity case, even though an

appeal of the lower court's denial of qualified immunity is now before this Court.[1] Further, the orders deny the absolute statutory right of the United States to be substituted for Mr. Behrens as defendant on those counts sounding in common law tort. Substitution is mandated by the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679 ("Westfall Act").

The district court has refused to stay its orders, pending appeal to this Court.[2] If not stayed by this Court, Mr. Behrens will be irreparably harmed. The Supreme Court explained in *Butz v. Economou*, 438 U.S. 478 (1975), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), that qualified immunity is intended to protect government officials, not only from adverse money judgments, but from the burdens and distractions of both discovery and trial. To ensure that the burdens of litigation are not imposed upon individuals claiming qualified immunity, the decision of a trial court denying such immunity is immediately appealable, under the *Cohen* collateral order doctrine. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1984); *Manhattan Beach Police Officers Association, Inc. v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). If an official must undergo discovery and trial, even though he has appealed the immunity issue to a higher court, the protections of the immunity defense

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[1] The appellant's brief is due to be filed on or before February 20, 1990.

[2] A copy of the district court order denying a stay pending appeal, and a copy of the appellants, notice of appeal, are attached to this motion.

will have been irreparably lost. Accordingly, this Court has expressly held that "until the threshold issue of immunity is resolved, discovery should not proceed." *Di Martini v. Ferrin*, 889 F.2d 922, 926 (9th Cir. 1989); see also, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989).

Indeed, because of the importance of preserving the immunity defense in the face of pending discovery and trial, the Seventh Circuit has held that appeal of an immunity issue *automatically stays* further proceedings in the trial court. *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989).

Additional irreparable harm will befall Mr. Behrens from the failure to substitute the United States as defendant on the common law tort counts, as required by law. Absent a stay the common law counts will proceed to trial against Mr. Behrens. Congress clearly intended the opposite result when, by enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679, it mandated that the United States be substituted for federal employees sued for the alleged commission of common law torts, and that the case then proceed against the United States, under the Federal Tort Claims Act ("FTCA").

STATEMENT

A. Background

On March 17, 1984, the Federal Home Loan Bank Board adopted Formal Resolution 84-126, designating the defendant John Behrens a Supervisory Agent, hence an

agent of the Board and of the FSLIC.[3] Behrens became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.[4]

The plaintiff, Robert J. Pelletier, was the president-designate of Pioneer Savings & Loan Association. Because Pioneer was a so-called "de novo" savings and loan (an institution in operation less than three years at the time it applied for FSLIC insurance, see 12 C.F.R. 571.6(b)), Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan

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[3] These two agencies were recently abolished by enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. The functions of these agencies were transferred to several newly created agencies, including the Office of Thrift Supervision and the Resolution Trust Corporation. These changes have no direct effect on this lawsuit. Accordingly, we refer to the agencies as they existed at the time of the incidents charged in the complaint.

[4] Under 12 U.S.C. 1437(a) the Bank Board may delegate its functions, or the functions of the FSLIC, to "any officer, employee, agent, or administrative unit [of the Board]." The delegation of authority is formally carried out by the "Principal Supervisory Agent," 12 C.F.R. 501.10, and those who are delegated these powers are denominated "Supervisory Agents." Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.*

officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank. These problems were so serious that Behrens sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. The Present Lawsuit

This lawsuit was brought by Pelletier in response to his dismissal. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Mr. Behrens. The lawsuit sought damages from Behrens under a *Bivens* theory, the claim being that Behrens, action declining to approve Pelletier as president of Pioneer until the FSLIC investigation was completed violated plaintiff's Fifth Amendment property rights. The complaint also asserted various common law torts allegedly committed by Behrens, and sought equitable and monetary relief from the federal agencies.

Beherns moved to dismiss, or in the alternative for summary judgment. He argued, *inter alia*, that the sole remedy for common law tort claims based upon actions

of an employee of the government is the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679. Under this statute the United States must be substituted for the federal employee, and the case must then proceed under the FTCA.

Beherns additionally asserted that the California one year statute of limitations, Cal. Civ. Proc. Code, Section 340(3), barred the *Bivens* claim and the common law tort claims; that "special factors counselling hesitation" barred a *Bivens* remedy, under the authority of *Bush v. Lucas*, 462 U.S. 367 (1983); and that he was entitled to qualified immunity from suit, as a federal officer who violated no clearly established law.

C. The District Court Orders

The district court, on September 11, 1989, dissolved a previously entered protective order barring discovery. Thereafter, on October 5, 1989, the lower court issued an order disposing of defendants, motion to dismiss, and denying the motion for summary judgment.

The court concluded that the primary actions upon which plaintiff's complaint was based – the letter from Beherns, declining to approve the appointment of Pelletier as Pioneer's president, and Pioneer's subsequent independent action terminating Pelletier's employment, were time-barred under California's one year statute of limitations. Accordingly, the court granted the motion to dismiss the *Bivens* count, but only "to the extent said claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and

Loan * * * ." (Order of October 5, 1989, Slip op. 2). Even though no other *specific* acts commited by Behrens were alleged in the complaint, but only the general charge that defendants engaged in a continuing conspiracy to keep plaintiff from finding suitable employment in the financial industry, the district court refused to dismiss the *Bivens* count "to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." (*Id.* at 3).

Applying the same logic, the district court ruled that several of the common law tort counts against Beherns would be dismissed, as barred by the California one year statute of limitations, but only insofar as the claims were "based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer" (Slip op. 4). Further, the court denied the motion seeking substitution of the United States on the common law counts – even though this is required by statute.

Since the district court had earlier dissolved a protective order barring discovery, and since the district court, on November 8, 1989, denied Beherns, motion to stay discovery and trial pending appeal, Beherns now faces the twin burdens of discovery and trial – even though an appeal of the denial of qualified immunity is pending before this Court.

Moreover, since the district court has also denied the motion of the Bank Board for a stay pending appeal of the substitution issue, Beherns also now faces a trial on the common law tort counts.

ARGUMENT

This case meets the requirements for a stay pending appeal. In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the Supreme Court reaffirmed the traditional four-factor test for evaluating the necessity of issuing stays: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

A. Irreparable Harm

1. This Court, the Supreme Court, and most other federal courts, have recognized that the immunity defense is intended to spare the federal official the burdens of discovery and trial. Permitting discovery and trial to proceed while a good faith appeal of the immunity issue is pending in the court of appeals inevitably causes irreparable harm by requiring the defendant to forfeit the very protections which the defense of qualified immunity is intended to provide. See, *e.g. Harlow v. Fitzgerald, supra*, 457 U.S. 17 (a principal purpose of the official immunity defense is to protect public officials from "broad-ranging discovery" that can be "peculiarly disruptive of effective government"); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (the essence of official immunity is "its possessor's entitlement not to have to * * * stand trial *or face the other burdens of litigation*) (emphasis added). This Court has itself recently observed that denials of qualified immunity are

immediately appealable under the collateral order doctrine because "[d]enying the official interlocutory review denies him or her the right to avoid trial * * * ." *Di Martini v. Ferrin*, 889 F.2d at 925. Thus, "until the threshold issue of immunity is resolved, discovery should not proceed." (*Id.* at 926).[5] It follows that if a trial court permits discovery and trial to go forward while an appeal of the denial of qualified immunity is pending, the defendant is irreparably harmed. Even if he prevails on appeal, the right not to be subject to discovery and trial will have already been lost. For this reason, the United States Court of Appeals for the Seventh Circuit recently held that whenever the denial of official immunity is appealed, the proceedings before the trial court are *automatically stayed*. See *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989). The Seventh Circuit reasoned as follows:

> The justification for the interlocutory appeal is that the trial destroys rights created by immunity * * * . It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . [A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial. *Cf. Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738 ("Until this threshold immunity question is resolved, discovery should not be allowed."). [870 F.2d at 1338]

In this case, the district court has refused to stay discovery and trial on the immunity issue. The court has

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[5] See also, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989).

not even seen fit to issue a narrow discovery order, although the Supreme Court's decision in *Anderson* makes it clear that if discovery is permitted, the discovery orders must be narrowly drawn.[6] Thus, only a stay pending appeal will prevent irreparable harm to the defendant.

2. The irreparable harm Beherns will suffer will be compounded by the refusal of the district court to substitute the United States as defendant on the common law tort counts.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-64, 102 Stat. 4563 (1988) absolutely and unequivocally requires substitution of the United States in the circumstances presented here. See, *Sowell v. American Cyanamid Company*, 888 F.2d 802 (11th Cir. 1989); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989). The act was an express congressional response to *Westfall v. Erwin*, 484 U.S. 292 (1988), and was intended to restore the general rule of absolute immunity for torts committed by federal employees within the scope of their duties, a rule which had been eroded by the *Westfall* case. *See* H.R. Rep. 100-700, 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S. Code Cong. & Ad. News 5945, 5946. Congress recognized that such immunity is "essential if Federal employees [a]re to be willing to carry out the duties of their office." *Id.* To guard against the debilitating effects of personal liability, Congress amended the

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[6] Although there may be instances where discovery is necessary to resolve factual disputes, "any such discovery should be tailored specifically to the question of * * * immunity." *Anderson v. Creighton*, 483 U.S. at 646 n.6.

Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, by (1) providing that the FTCA's remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee * * * "; and (2) authorizing the Attorney General or his designate to issue a "certification" that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose * * * ." Reform Act, secs. 5, 6, amending 28 U.S.C. 2679(b), 2679(d)(1)(2). Once a scope certification is made, the suit "shall be deemed an action against the United States" under the FTCA and that "the United States shall be substituted as the party defendant." *Id.*

In this case, there was a proper certification by the Attorney General stating that Behrens was acting within the scope of his employment. However, the district court declined to substitute – giving no reason except that substitution was "premature." Since the district court also refused to stay its order pending appeal to this Court,[7] Mr. Behrens will have to stand trial on the common law tort counts himself, contrary to the specific provisions of the Westfall statute. This is clearly irreparable harm, and for this reason too a stay pending appeal is respectfully requested.

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[7] Like the appeal of the denial of qualified immunity, the appeal of the refusal to substitute the United States is reviewable as a final collateral order under 28 U.S.C. 1291. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The order denying substitution is separable from the remainder of the case, involves an important and unsettled question of law, and has final consequences.

B. Likelihood of Success on the Merits

1. The defendants have every likelihood of success on the merits of their appeal. The act upon which the legal theories of plaintiff's complaint principally rest – Behrens, letter declining to approve Pelletier as President until the FSLIC investigation was concluded – was correctly found by the district court to be time-barred.[8] This leaves only generalized complaints that Behrens and the other defendants somehow "conspired" to deny Pelletier employment in the financial industry. However, as this Court has repeatedly held, most recently in *Di Martini v. Ferrin*, where similar allegations were made, "a plaintiff is not entitled to survive on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. 889 F.2d at 927. Clearly, plaintiff should not be able to preclude a ruling on immunity, or on the common law tort issues, by relying on liberal notions of pleading; the defendant has given a detailed explanation of his actions and plaintiff cannot simply rest upon the bare allegations of his complaint. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

2. Moreover, even if the specific allegations of the complaint were not time-barred, the district court should have granted Behrens immunity on the *Bivens* count, and should have substituted the United States on the common law tort counts.

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[8] See Cal. Civ. Proc. Code, Section 340(3); *Keller v. United States*, 667 F.Supp. 1351, 1360 (S.D. Cal. 1987).

(a). Qualified Immunity

The plaintiff's principal complaint is that because he was being investigated by the FSLIC for wrongdoing during his tenure at another bank, Behrens refused to approve his appointment as president of Pioneer. He attempts to make out of this action by Behrens a constitutional violation. However, there was nothing remotely illegal about Behrens, refusal to approve Pelletier. Pelletier was the subject of an FSLIC investigation which found wrongdoing at the Beverly Hills Savings & Loan Association, where Pelletier had been a senior loan officer. Had Beherns approved Pelletier, he might later have been charged with not carrying out the mandates of his office.[9] All Behrens did was to decline approval of Pelletier "at this time," and until "the investigation into the failure of Beverly Hills Saving is complete." It was, after all, Pelletier's employer, Pioneer, that made the decision to terminate him; this was not a decision made by Behrens.

To deny immunity, the district court would have had to find that Behrens, in declining to approve Pelletier as president, reasonably should have known he was violating a clearly established right. As we have just observed, Behrens was only being true to the requirements of his

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[9] Indeed, the FSLIC subsequently sued Pelletier and other former officers and directors of Beverly Hills for alleged breach of fiduciary duty, negligence, waste and diversion of corporate assets. The defendants in that case, Pelletier included, have finalized a settlement agreement expected to result in the payment to FSLIC of more than $8 million.

job. He could not have reasonably believed he was violating clearly established law.

The Fifth Circuit's recent holding in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989) supports this conclusion. In a factual situation remarkably similar to the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established right to property or liberty interest in being a president designate, for the position was contingent upon regulatory approval. 876 F.2d at 1213, 1214.[10]

It appears that the district court denied Behrens immunity, because of doubts over Behrens, employment status. Behrens was appointed by the Federal Home Loan Bank Board and the FSLIC, but he was paid by the

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[10] See also, *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 107 S. Ct. 276 (1986) (unsuccessful applicant for ALJ position had no property interest in the job).

While this Court, in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987) (now once again on appeal on the qualified immunity issue, No. 89-35270), held that the plaintiff had a property right in private employment which required a hearing prior to termination, that decision was not handed down until 1987. The acts complained of here occurred in 1986. In any event, the panel in *Mackey* was faced with a situation where an employee of the government told a private corporation to fire an individual; in this case, Beherns simply declined to approve the appointment of Pelletier pending the outcome of the FSLIC investigation.

Federal Home Loan Bank Board of San Francisco, a private institution. This fact, however, should not change the immunity analysis. Official immunity questions. are to be decided on the basis of the nature of the functions performed by the defendant, not on the defendant's position in the government. *Harlow v. Fitzgerald*, 457 U.S. at 807, 811-12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n. 30; *Butz v. Economou*, 438 U.S. 478, 511 (1978). Here, in any case, defendant Behrens was actually an appointee of the Board and the FSLIC, and performing federal functions entrusted to him by statute and regulations. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus in a position to claim qualified immunity from suit.

(b). Substitution of the United States

(1). Clearly, the United States should have been substituted for Behrens under the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the suit permitted to proceed to judgment under the FTCA.

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States).[11]

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[11] See also, *Colony First Fed. Sav. v. Federal Sav. & Loan*, 643 F.Supp. 410, 416 (C.D. Cal. 1986) (both Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation federal agencies for FTCA purposes); *Kohlbeck v. Kis*, 651 F.Supp.

It is equally clear that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, the term "employee of the government" includes "officers or employees of any federal agency," members of the military or naval forces of the United States, and most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. This definition was intended to be read liberally. See *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972); *Ferguson v. United States*, 712 F.Supp. 775, 781 (N.D. Cal. 1989). The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

(2). The remaining question is whether Behrens was acting within the scope of his employment when he

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1233, 1236 (D. Mont. 1987) (FSLIC federal agency for FTCA); *Federal Savings and Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969); *Safeway Portland E.F.C.U. v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1215 (9th Cir. 1974).

advised against employing Pelletier until the BHSL investigation had been completed. The district court determined, in dissolving an earlier entered protective order, that "whether [Behrens] acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." This conclusion is wrong, for the following reasons.

First, the Attorney General certified that Behrens was acting within the scope of his employment in this case. The burden of proof has thus become the plaintiff's burden; he must establish that the Attorney General's decision is erroneous.

Second, the judgment of the Attorney General regarding scope deserves substantial deference from the courts. While the issue of scope is ultimately a matter of state tort law, underlying that ultimate issue are determinations on matters that are uniquely within the purview of the Executive Branch – *i.e.*, defining the activities that are within the employer's "business," and ascertaining the range of responsibilities entrusted to the individual employee. These are matters that are governed by the agency's statutory responsibilities, as well as the regulations and internal directives of the agency itself, often including written descriptions of the scope of individual duties. Executive agencies are entitled to great deference in construing and applying such materials. *See generally, Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965). When the Attorney General, in consultation with the agency in question, determines that an individual was in fact acting within the scope of his duties as defined by his employing agency, that is a determination

to which the courts should give great weight. An affirmative scope determination is, moreover, a step that the Attorney General is not apt to take lightly, since it unilaterally opens up the federal treasury to the possibility of liability that it would not otherwise face.

Third, it is clear that Behrens *was* acting within scope of his authority when he recommended that the decision on plaintiff's appointment as president of Pioneer be deferred. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, Section 107, page 743 (1986 ed.).[12] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests. See 12 C.F.R. 501.11(e). tions such as Pioneer, (*i.e.* "*de novo* applicants for insurance"), Behrens was empowered to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of

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[12] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal. Rptr. 106 (1986).

the management is questionable," *id.*, Behrens was acting within the scope of his authority in refusing to approve the plaintiff as Pioneer's president; for there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer. Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent."

In sum, the United States should have been substituted for the defendant under the Westfall statute.[13]

C. The Public Interest And Lack Of Harm To Pelletier

These final factors are self-evident, and need little discussion. They favor granting the stay.

1. The public interest clearly lies in staying the district court actions pending appeal. Laws such as the

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[13] We recognize that in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), this Court held that the Westfall Act's substitution provision applies only where the FTCA provides an effective alternative remedy for the plaintiff. Here, unlike the situation in *Smith*, the FTCA does provide an effective alternative remedy. The plaintiff in our case would only be barred by 28 U.S.C. 2680(h) from continuing with his claim based on interference with contractual relations; he would have a viable FTCA action against the United States on his other allegations, which assert the commission of the common law torts of negligence, and negligent and intentional infliction of emotional distress.

Federal Employees Liability Reform and Tort Compensation Act of 1988 cannot be given short shrift by the courts. That law plainly requires substitution of the United States. By its action denying substitution, the court has undermined the public interest in having the laws of Congress enforced.

Similarly, it is in the public interest to have the qualified immunity defense preserved pending appeal. The very purpose of the immunity defense, which is to spare government officals the burdens of discovery and trial, would be irrevocably done away with by permitting a trial prior to this Court's ruling on the immunity issue. Particularly in a case like this, where the district court has given little justification for its actions, and the moving parties have demonstrated a likelihood of success on appeal, the public interest can only be served by staying the discovery and trial.

2. No irreparable harm will be caused the plaintiff by such actions. Indeed, once the United States is substituted under the Westfall statute, the plaintiff will be able to litigate his case against the government, knowing that any ultimate judgment will in fact be paid out of the federal treasury.

CONCLUSION

For the foregoing reasons, a stay of discovery and trial in the district court, pending appeal, is respectfully requested.

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DEFENDANT/APPELLANT'S BRIEF, EOD MARCH 6, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR FEDERAL DEFENDANT BEHRENS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

The undersigned, counsel of record for the appellant John W. Behrens, certifies that the following have an interest in the outcome of this case:

John W. Behrens, defendant

Robert J. Pelletier, plaintiff

United States of America, as potential substituted defendant

/s/ Richard A. Olderman
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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT OF JURISDICTION..... 2

STATEMENT OF THE CASE..... 3

1. Nature of the Case 3
2. Statutory Background: Home Loan Bank System..... 4
3. Statutory Background: The Westfall Act 7
4. Statement of Facts 10
5. The Present Litigation 12
6. The District Court Orders..... 13

REVIEWABILITY AND STANDARD OF REVIEW... 15

SUMMARY OF ARGUMENT..... 15

ARGUMENT 18

I. THE DISTRICT COURT ERRED BY NOT SUBSTITUTING THE UNITED STATES FOR DEFENDANT BEHERNS ON THE COMMON LAW TORTS COUNTS..... 18

A. This Court Has Jurisdiction To Hear This Issue Under The Cohen Collateral Order Doctrine..... 18

B. By Statute, The United States Must Be Substituted As Defendant, And Plaintiff's Claim Must Be Dismissed..... 20

1. Behrens is a Federal employee for FTCA Purposes 22

2. Behrens was Acting Within the Scope of His Employment 24

II. CONGRESS' COMPREHENSIVE REGULATION OF THE THRIFT INDUSTRY IS A SPECIAL FACTOR BARRING A BIVENS REMEDY..... 29

III. DEFENDANT BEHRENS WAS ENTITLED TO QUALIFIED IMMUNITY..... 37

CONCLUSION 45

CERTIFICATE OF SERVICE

STATEMENT OF RELATED CASE

STATUTORY ADDENDUM

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Creighton, 483 U.S. 635 (1987) 2, 37

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 41

Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989)..... 16

Baker v. Racansky, 887 F.2d 183 (9th Cir. 1989)..... 15

Barr v. Matteo, 360 U.S. 564 (1959) 7

Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2099 (1989) 45

Bishop v. Wood, 426 U.S. 341 (1976) 42

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Broughton v. Courtney, 861 F.2d 639 (11th Cir. 1988) 20

Bruck v. United States, 338 F.2d 427 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965) 23

Bush v. Lucas, 462 U.S. 367 (1983) 1, 30, 36

Brucker v. United States, 338 F.2d 427 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965) 22

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 41

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 25

Chin v. Bowen, 833 F.2d 21 (2d Cir. 1987) 45

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 2, 18, 19, 20

Colony First Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Co., 643 F. Supp. 410 (C.D. Cal. 1986) 22

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989) 17, 39, 42

Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938) 28

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 19

Cross v. Fiscus, 830 F.2d 755 (7th Cir. 1987) 28

Di Martini v. Ferrin, 889 F.2d at 925 ..... 18, 41

Dornan v. United States, 460 F.2d 425 (9th Cir. 1972) 24

Drake v. Scott, 812 F.2d 395 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987) 20

F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989) 43, 44

Federal Sav. & Loan Ins. Corp. v. Quinn, 419 F.2d 1014 (7th Cir. 1969) 22

Ginter v. Stallcup, 869 F.2d 384 (8th Cir. 1989) 41

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 37

Howard v. Parisian, 807 F.2d 1560 (11th Cir. 1987) 20

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983) 44

In Re Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984) 27-28

Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968) 27

Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989) 45

Karamanos v. Egger, 882 F.2d 447 (9th Cir. 1989) .. 1, 16, 36

Keller v. United States, 667 F. Supp. 1351 (S.D. Cal. 1987) 45

Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987) 22

Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) 1, 35

Le Bid v. Hanson, 899 F.2d 1124 (9th Cir. 1990) 1, 2, 15, 16, 29, 30, 36

Letnes v. United States, 820 F.2d 1517 (9th Cir. 1987) 24

Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach, 881 F.2d 816 (9th Cir. 1989) 2, 18

McSurely v. Hutchinson, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) 45

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987) ...40, 41

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2, 18, 19

Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962 P.2d 6767 Cal. Rptr. 106 (1986) 26

Riverhead Savings v. National Mortgage Equity Corp., 893 F.2d 1109 (9th Cir. 1990) 19

Safeway Portland E.F.C.U. v. Federal Deposit Ins. Corp., 506 F.2d 1213 (9th Cir. 1974) 22

San Filippo v. United States, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) 20

Saratoga Savings & Loan v. Federal Home Loan Bank, 724 F. Supp. 683 (N.D. Cal. 1989) 5, 16, 24

Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967) 28

Schweiker v. Chilicky, 108 S. Ct. 2460 (1988) 1, 29, 30

Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980) 22

Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) 42

Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989) 29

Sowell v. American Cyanamid Co., 888 F.2d 802 (11th Cir. 1989) 16

Strothman v. Gefreh, 739 F.2d 515 (10th Cir. 1984) 28

Todd v. United States, 849 F.2d 365 (9th Cir. 1988) 20

Udall v. Tallman, 380 U.S. 1 (1965) 25

United States v. Becker, 378 F.2d 319 (9th Cir. 1967) 24

United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976) 9

United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987) 20

United States v. N.A. Degerstrom, Inc., 408 F.2d 1130 (9th Cir. 1969) 7, 8, 9, 24

Westfall v. Erwin, 484 U.S. 292 (1988) 19

White v. Office of Personnel Management, 787 F.2d 660 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986) 40

Wilson v. Garcia, 471 U.S. 261 (1985) 45

Statutes:

Federal Home Loan Bank Act:

12 U.S.C. §§ 1424 5

12 U.S.C. §§ 1426 5

12 U.S.C. §§ 1427(j) 4

12 U.S.C. §§ 1432(a) 5

12 U.S.C. §§ 1437(a) 5, 43

Home Owners Loan Act:

12 U.S.C. §§ 1464 *et seq* 4

Savings and Loan Control Act:

12 U.S.C. §§ 1725(a) 4

12 U.S.C. §§ 1725(c) 4

12 U.S.C. §§ 1726(c) 7, 32, 33, 34

12 U.S.C. §§ 1730(g)(1) and (2) 6, 32

12 U.S.C. §§ 1730(g)(5) 7, 33

12 U.S.C. §§ 1730(g)(6) 33

12 U.S.C. §§ 1730(h) 6, 32

12 U.S.C. §§ 1730(h)(2) 33

12 U.S.C. §§ 1730(k)(1) 4

12 U.S.C. §§ 1730(2)(q)(7)(D) 31

12 U.S.C. §§ 1730(q) 31

12 U.S.C. §§ 1730(q)(B)(i) 31

12 U.S.C. §§ 1730(q)(B)(ii) 31

12 U.S.C. §§ 1730(q)(1) 31

12 U.S.C. §§ 1730(q)(4) 33

12 U.S.C. §§ 1730(q)(5) 33

12 U.S.C. §§ 1730(q)(6)(A) 33

12 U.S.C. §§ 1730(q)(6)(B) 31

28 U.S.C. 510 9

28 U.S.C. 1291 .....

28 U.S.C. 1331 .....

28 U.S.C. 2671 .....22, 23

28 U.S.C. 2679(b) 8

28 U.S.C. 2679(b)(1) 21

28 U.S.C. 2679(d)(1)-(2) 9, 21

28 U.S.C. 2679(d)(4) 9, 21

28 U.S.C. 2680(h) 14, 29

Financial Institutions Reform, Recovery, and Enhancement Act of 1989, Pub. L. No. 101-73, 101 Stat. 183 4

California Civil Procedure Code, 340(3) 45

29 Cal. Jur. 3d, § 107, at 743 (1986) 26

Regulations:

12 C.F.R. 501.10 ..... 5, 23, 43

12 C.F.R. 501.11(e) 6, 26

12 C.F.R. 571.6 ..... 6, 27, 32, 38

12 C.F.R. 571.6(b) 6, 11, 27, 32, 34, 38

12 C.F.R. 571.6(b)(2)(i) (1986) 34

28 C.F.R. 15.3 (1988) 9

Legislative Materials:

H.R. Rep. 100-700, 100th Cong., 2d Sess. 2 *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5946 19

H.R. Rep. No. 100-700, 100th Cong., 2d Sess. 5, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5949 8-9

Miscellaneous:

16 Wright & Miller, *Federal Practice and Procedure*, § 3937 (1977) (& Supp.) 20

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR FEDERAL DEFENDANT BEHRENS

QUESTIONS PRESENTED

1. Whether, to the extent the complaint alleges the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988.

2. Whether, under the authority of *Bush v. Lucas*, 462 U.S. 367 (1983), *Schweiker v. Chilicky*, 108 S. Ct. 2460

(1988), *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990), the special factor of Congress' comprehensive regulation of the thrift industry bars plaintiff's *Bivens* action.

3. In any event, whether the federal defendant's motion for qualified immunity should have been granted by the district court, under the standards set by the Supreme Court in *Anderson v. Creighton*, 483 U.S. 635 (1987).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides a cause of action for damage actions against federal officials sued in their personal capacities for asserted violations of constitutional rights.

This Court has jurisdiction to review the denial of qualified immunity under 28 U.S.C. 1291. See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). In addition, as explained *infra* at 17-19, this Court has jurisdiction over the Westfall Act substitution issue, by virtue of the *Cohen* collateral order doctrine.

Additionally, this Court has pendent jurisdiction to review the question whether a *Bivens* remedy is barred by the special factor of Congress' comprehensive regulation

of the thrift industry. See, *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990).[1]

STATEMENT OF THE CASE

1. Nature of the Case.

The defendant, a Supervisory Agent of the Federal Home Loan Bank Board ("Bank Board"), declined to approve the plaintiff as president of a California bank because the plaintiff was under investigation by the FSLIC for wrongdoing. Plaintiff sued, asserting a *Bivens* cause of action for the alleged commission of constitutional torts, and claiming the commission of common law torts as well.

The district court declined to dismiss the *Bivens* count and the common law tort counts in their entirety, although it found that the state statute of limitations barred the lawsuit to the extent it rested on the failure to approve plaintiff as president. The court also declined to grant defendant's motion for qualified immunity, and his motion seeking substitution of the United States on the common law counts, as required by the Federal Employees Liability Reform and Tort Compensation Act of 1988. The defendant now appeals the lower court's immunity rulings.

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[1] The district court entered its order denying summary judgment on October 5, 1989. The federal defendant's notice of appeal was filed on December 2, 1989.

2. Statutory Background: Home Loan Bank System[2]

a. Congress created the Federal Home Loan Bank System in the 1930s to restore confidence in American thrift institutions. The system is controlled by the Bank Board, an independent agency of the Executive Branch. The Bank Board is charged with oversight of the nation's federal savings and loan associations, and other federally insured savings institutions. The Bank Board may charter, organize, supervise and regulate savings and loans. See, Home Owners Loan Act, 12 U.S.C. § 1464 *et seq.* In addition, the Board is charged with maintaining the fiscal stability of the savings and loan industry, and must protect depositors in member institutions, through the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FSLIC is a separate agency, which operates under the direction of the Bank Board. 12 U.S.C. §§ 1725(a), 1725(c); 1730(k)(1).

The Federal Home Loan Bank System is composed of twelve regional banks, including the Federal Home Loan Bank of San Francisco ("FHLB-SF"). These banks primarily serve as central reserve credit sources for thrift institutions in their regions. 12 U.S.C. 1427(j). Each regional Federal Home Loan Bank operates as a federally chartered corporate entity whose stock is subscribed to by its

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[2] Most of the banking statutes and regulations discussed in this brief have changed, in light of the enactment by Congress of the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 (FIRREA), Pub. L. No. 101-73, 101 Stat. 183. Since all the actions in question took place prior to the enactment of FIRREA, this brief discusses only pre-FIRREA law.

"members," *i.e.* the eligible savings institutions within that Bank's district. See 12 U.S.C. §§ 1424, 1426, 1432(a). The banks, although privately owned, carry out governmental functions and are subject to plenary control by the Bank Board.

Under Section 17(a) of the Federal Home Loan Bank Act, 12 U.S.C. 1437(a), the Bank Board has authority to delegate certain of its supervisory and examination functions to persons who are officers and employees of the regional banks (not to the regional banks themselves). The delegation of authority was formally carried out in this case by Resolution of the Bank Board. However, a delegation of authority may also be made by the "Principal Supervisory Agent." Those individuals who are delegated supervisory functions are denominated "Supervisory Agents." 12 C.F.R. 501.10. See generally, *Saratoga Savings & Loan v. Federal Home Loan Bank*, 724 F. Supp. 683, 684-5 (N.D. Cal. 1989). Bank Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.*

b. A duly appointed Supervisory Agent is authorized to act broadly in the agency's interests:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Moreover, when new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.*

c. Once an approved director or officer has assumed a position with and insured institution, the FSLIC has a continuing obligation and authority to monitor the quality of management. When the FSLIC believes that an officer or director of an insured institution has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g)(1) and (2). The agency has the same duty when a thrift officer or director has been indicted or otherwise charged with a crime involving dishonesty or breach of trust. *Id.* § 1730(h).

Although Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described which pertain to approved bank officers (see 12 U.S.C. § 1730(g)(5)), it has not provided for administrative or judicial review of the FSLIC's decisions under 12 U.S.C.

§ 1726(c), the statutory provision which governs applications for FSLIC insurance, and under which defendant Behrens took the action challenged here.

3. Statutory Background: The Westfall Act.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, hereafter referred to as the Westfall Act, has its provenance in the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long as they were acting within the scope of their employment. See, *e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion). In *Westfall*, however, the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 297-98 (emphasis in original).

By adding the requirement that a federal employee's actions be "discretionary in nature," the Court significantly restricted the previously recognized scope of absolute immunity for common law torts. At the same time, however, the Supreme Court invited Congress to review by legislation the standard it had adopted, remarking that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. The Court added that "[l]egislated standards governing the immunity of federal

employees involved in state-law tort actions would be useful." *Ibid.*

Within 10 months, Congress responded to the Court's invitation by enacting legislation to overturn the *Westfall* decision. The Westfall Act restores the absolute immunity of government employees for acts within the scope of their employment by requiring plaintiffs in such cases to proceed exclusively against the United States under the Federal Tort Claims Act ("FTCA").[3]

The heart of the Westfall Act lies in Sections 5 and 6, which amend the FTCA. Section 5 amends 28 U.S.C. 2679(b) to provide that the FTCA's remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim * * * ." As a result, in the words of the House report on the Westfall Act, "the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort." H.R. Rep. No. 100-700, 100th Cong., 2d Sess. 5 ("House Report"), *reprinted in* 1988 U.S. Code Cong. & Admin. News ("USCCAN") 5949. Congress's purpose in enacting this exclusive-remedy scheme was to render federal employees "immune from personal liability" for actions within the scope of their employment, thereby

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[3] The text of the Westfall Act is reproduced in the statutory addendum to this brief.

"return[ing] [them] to the status they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947.

Section 6 implements Section 5's exclusive-remedy provision by authorizing the Attorney General or his designate to issue a "scope certification" – a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose * * * ." 28 U.S.C. 2679(d)(1)-(2).[4] Once a scope certification is made, Section 6 provides that the suit "shall be deemed an action against the United States" under the FTCA and that "the United States shall be substituted as the party defendant." *Ibid.* Any such action "shall proceed in the same manner as any action against the United States [under the FTCA] * * * and shall be subject to the limitations and exceptions applicable to those actions." *Id.* Section 2679(d)(4).

4. Statement of Facts.

A.1. The defendant, John W. Behrens, is an employee of the FHLB-SF. On March 17, 1984, the Federal Home Loan Bank Board adopted Formal Resolution 84-126, designating Behrens a Supervisory Agent, hence

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[4] The Attorney General has delegated this authority by regulation to United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See, 28 C.F.R. 15.3 (1988). The Attorney General's delegation authority is set forth in 28 U.S.C. 510. See, *e.g.*, *United States v. Cuomo*, 525 F.2d 1285, 1287-88 (5th Cir. 1976). The Director of the Justice Department's Torts Branch also has authority to make scope certifications. See, 28 C.F.R. 15.3 (Appendix).

an agent of both the Bank Board and of the FSLIC. (R.E. 20).[5] Behrens continued to be paid by the FHLB-SF, but as an employee of the Bank Board and the FSLIC became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.

2. The plaintiff, Robert. J. Pelletier, was the president-designate of Pioneer Savings & Loan Association. Pioneer's predecessor in interest, South Coast Savings & Loan Association, had received Board approval for insurance of its accounts. However, one of the conditions of this approval, as specified by Bank Board Resolution 84-164, was that the institution –

> shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following, * * * the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval. [R.E.27]

In sum, Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan

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[5] "R.E." refers to the excerpts of record filed with this brief.

officer and head of the bank's Major Loan Division, disclosed wrongdoing at that bank, problems so serious that on April 23, 1985 the Bank Board declared the Beverly Hills bank insolvent and appointed the FSLIC as its receiver.

The FSLIC's continuing investigation into the problems at the Beverly Hills bank raised questions about Pelletier, who had been a member of the bank's Senior Loan Committee and the head of the Major Loan Division. Indeed, Pelletier was eventually named as a defendant in a lawsuit brought by the FSLIC against the former officers and directors of the Beverly Hills Savings & Loan, seeking to recover damages for alleged breach of fiduciary duty, negligence, waste, divergent of corporate assets and negligent misrepresentation. [R.E. 28].

As a result of the FSLIC's investigation, which raised doubts about Pelletier's management, and pursuant to his mandate as Supervisory Agent, which required him to "reject an applicant if [he] finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and empowered him to "reject an applicant if the character of the management is questionable," *Id.*, Behrens sent a letter to Pioneer's board of directors. The letter, dated May 8, 1986, and written on the official letterhead of the "Federal Home Loan Bank Board, Eleventh District, Office of Supervisory Agent," was signed "John W. Behrens, Supervisory Agent." Marked "Confidential," the letter stated as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard. [R.E. 28]

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by pioneer.

5. The Present Litigation.

This lawsuit was brought by Pelletier after his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and

substantive due process rights under the Fifth Amendment. Counts three and four sought damages and equitable relief for asserted violations of the Administrative Procedure Act and the Privacy Act. Counts five through eight sought damages for the alleged commission of the following common law torts: interference with contract rights and inducement to breach contract; intentional infliction of emotional distress; negligent infliction of emotional distress; negligence. [R.E. 1-17].

The defendant moved to dismiss, or in the alternative for summary judgment, urging *inter alia* that he was entitled to qualified immunity from suit on the *Bivens* count, and that pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 the United States must be substituted as defendant, and the case then allowed to proceed against the sovereign under the Federal Tort Claims Act.

6. The District Court Orders.

The district court acted without holding a hearing. In an order dated September 11, 1989, the court dissolved a protective order which had earlier been granted by a magistrate. The district court stated that "although Behrens may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." [R.E. 29].

Subsequently, on October 6, 1989, the court entered a four page ruling on all pending motions to dismiss, or in the alternative for summary judgment. The court held

that the California one year statute of limitations barred any *Bivens* suit based on the letter that Supervisory Agent Beherns sent to Pioneer, or based upon plaintiff's loss of employment. Nonetheless, because plaintiff had made unsupported allegations of a conspiracy to keep him from finding employment in the financial institutions industry, the court denied defendant's motion for qualified immunity "to the extent said [constitutional] claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." [R.E. 33].

The court also denied, without explanation, the motion seeking substitution of the United States as defendant, even though substitution is required by the Westfall statute. *Id.*

Further, the court denied Behrens' motion to dismiss counts five and eight of the complaint, which were based on the torts of interference with contract and negligence; and granted the motion to dismiss counts six and seven, which alleged intentional and negligent infliction of emotional distress, only to the extent such claims were barred by the California one year statute of limitations.[6]

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[6] The court also refused to dismiss the APA claim for injunctive relief, which was addressed to Behrens in his official capacity; and granted the motion to dismiss APA and Privacy Act claims addressed to Behrens in his individual capacity. The October 6th ruling also kept all the other defendants in the case on various counts. The court also granted the motion of the United States to dismiss Count 5 of the complaint as barred by 28 U.S.C. 2680(h), but denied the United States' motion to dismiss the remaining common law tort counts. (R.E. 33-34).

Since the district court had earlier vacated a magistrate's protective order, thereby subjecting the defendant to both discovery and trial, defendant moved for a stay pending appeal to this Court.

The stay was denied. A similar motion for a stay was filed with this Court on February 2, 1990 and is presently pending.

REVIEWABILITY AND STANDARD OF REVIEW

This Court "reviews *de novo* the denial of a qualified immunity defense." *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir.1989). Since it involves a pure question of law, this Court also reviews *de novo* the question whether the United States should have been substituted for the defendant Behrens under the authority of the Westfall statute, and the question whether a *Bivens* remedy is barred by the special factor of Congress' comprehensive regulation of the thrift industry. See, *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990).

SUMMARY OF ARGUMENT

This case presents three principal questions in clear form: whether the district court erred when it declined to substitute the United States as defendant on the common law tort counts; whether the court erred when it failed to dismiss the Bivens claim; and whether the court erred by refusing to grant the defendant qualified immunity. The lower court's rulings on all three issues were wrong and should be reversed.

A. The district court erroneously declined to substitute the United States for defendant Behrens on common law tort counts, for substitution was affirmatively required by the Westfall Act. Since the plaintiff was a federal employee who at all times was acting within the scope of his authority, substitution was mandatory under the statute. See, *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Sowell v. American Cyanamid Co.*, 888 F.2d 802 (11th Cir. 1989); *Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F. Supp. at 684-5.

B. The district court also erred in its resolution of the *Bivens* issue. The precedents of this Court, including *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990), indicate that the special factor of Congress' comprehensive regulation of the thrift industry bars plaintiff's *Bivens* action. Congress has heavily regulated the thrift industry, and provided administrative and judicial remedies for removal of bank officers. However, Congress has not inadvertently declined to create such remedies for proposed officers such as the plaintiff. It would be improper, given the special factor of Congress' comprehensive thrift industry regulation, for a court to imply a *Bivens* remedy in these circumstances.

C. In any event, Behrens is entitled to qualified immunity on the *Bivens* count. To deny him this immunity, the plaintiff must not only show that Behrens violated clearly established law, but that on the basis of the information he reasonably believed to be true, Behrens

should have known he was violating such clearly established law. Plaintiff has failed to make this showing. Behrens not fire Pelletier, or even direct that he be fired; Behrens only stated in his letter to the Pioneer bank that the Board was "unable at this time to proceed with the application" seeking approval of Pelletier as president, because of the ongoing FSLIC investigation of the Beverly Hills bank where Pelletier had previously been employed. It was Pioneer which decided not to await the outcome of the FSLIC investigation, but to fire Pelletier and seek another president. This factual scenario indicates that Behrens acted properly; given what eventually occurred – Pelletier was sued by the FSLIC for alleged breach of fiduciary duty, waste and diversion of corporate assets – had Behrens acceded to Pioneer's request and approved Pelletier, with full knowledge of the ongoing FSLIC investigation, Behrens could have been charged with not carrying out the responsibilities of his office.

Furthermore, there was no clearly established due process law, about which Behrens should reasonably have known. The Fifth Circuit, in a situation similar to the one here, recently held that an applicant for the presidency of a proposed national bank who claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law, actually had no clearly established property right in employment where the employment was "contingent upon regulatory approval." *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1213 (5th Cir. 1989).

ARGUMENT

I.

THE DISTRICT COURT ERRED BY NOT SUBSTITUTING THE UNITED STATES FOR DEFENDANT BEHERNS ON THE COMMON LAW TORTS COUNTS

A. This Court Has Jurisdiction To Hear This Issue Under The Cohen Collateral Order Doctrine.

This Court has jurisdiction to hear the argument which we make on the following pages, pursuant to the *Cohen* collateral order doctrine. The argument is in essence an absolute immunity claim, immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

1. It is well-established that denials of immunity are final decisions within the meaning of 28 U.S.C. 1291, notwithstanding the absence of a final judgment. See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816 (9th Cir. 1989). A federal official's immunity is not a mere immunity from liability, but an "*immunity from suit.*" *Mitchell v. Forsyth*, 472 U.S. at 526 (emphasis in original). This right is lost if the case is permitted to go to trial. *Di Martini v. Ferrin*, 889 F.2d at 925.

When a federal employee takes actions within the scope of his employment, the Westfall Act vests him with absolute immunity from liability for common law tort claims based on those actions.[7] The mechanism for

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[7] The Westfall Act was an express congressional response to *Westfall v. Erwin*, 484 U.S. 292 (1988), and was intended to restore the general rule of absolute immunity for torts

granting absolute immunity is the substitution of the United States. The district court in this case, having failed to substitute the United States for Behrens, has effectively denied the federal employee absolute immunity from suit. This ruling is immediately appealable, under *Forsyth*.

2. To fall within the scope of the *Cohen* collateral order doctrine, the order sought to be appealed must (1) conclusively determine the dispute in question; (2) resolve an important issue completely separate from the merits of then action; and (3) be effectively unreviewable on appeal from a final judgment. See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Riverhead Savings v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990). These three conditions are satisfied here. The lower court's ruling determined that Behrens must stand trial as defendant, and rejected his claim under the Westfall statute to absolute immunity; in so ruling the court conclusively resolved an important issue, one separate from the merits of the common law tort claim. Moreover, any proceeding against Behrens on the common law tort counts will make the issue we wish to raise before this Court – whether substitution of the United States was mandatory – unreviewable. By the time the case reaches this Court after final judgment Behrens will have already been subject to the burdens of discovery and trial, the

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committed by federal employees within the scope of their duties, a rule which had been eroded by the *Westfall* case. *See* H.R. Rep. 100-700, 100th Cong., 2d Sess. 2 *reprinted in* 1988 USCCAN 5945, 5946.

very burdens that an immediate appeal of immunity decisions under the *Cohen* doctrine was intended to avoid.[8] The three conditions of *Cohen* have thus been met here, and the substitution issue is properly presented to this Court for review.

B. By Statute, The United States Must Be Substituted As Defendant, And Plaintiff's Claim Must Be Dismissed.

Insofar as common law torts are alleged, this case involves a routine application of the provisions of the

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[8] In the alternative, the Westfall substitution issue may be reviewed by the Court as pendent to the appeal of the denial of qualified immunity. Under the doctrine of pendent appellate jurisdiction, the appellate court may review an otherwise non-appealable issue when "there is sufficient overlap in the factors relevant to [the appealable and nonappealable] issues" to warrant the exercise or plenary jurisdiction. See, *Broughton v. Courtney*, 861 F.2d 639 (11th Cir. 1988); *San Filippo v. United States*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). The pendent jurisdiction doctrine effectuates the salutary policies of conserving judicial resources and avoiding piecemeal litigation. See *United States v. Ianniello*, 824 F.2d 203 (2d Cir. 1987). See also *Howard v. Parisian*, 807 F.2d 1560, 1566 (11th Cir. 1987); 16 Wright & Miller, *Federal Practice and Procedure*, § 3937 (1977) (& Supp.).

While we recognize that, at least in some circumstances, this Court frowns upon using pendent jurisdiction to reach nonimmunity issues, see, *e.g. Todd v. United States*, 849 F.2d 365, 368, 371 n.9 (9th Cir. 1988), the substitution issue is, as we explained above, in reality a statutory absolute immunity issue. Moreover, Behrens' employment status with the government is relevant to both the qualified immunity and substitution issues. Such overlap is a traditional ground for invoking a court's pendent jurisdiction. See, *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987); *San Filippo*, 737 F.2d at 255.

Westfall Act and the FTCA. When a federal employee takes actions within the scope of his employment, the Westfall Act vests him with absolute immunity from liability for common law tort claims based on those actions. By virtue of the Westfall Act, a plaintiff's claim against the United States for common law torts by a federal employee within the scope of his employment "is exclusive of *any* other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * ." 28 U.S.C. 2679(b)(1) (emphasis added). When the Attorney General or his designee certifies that the employee's actions were within the scope of employment, the Westfall Act mandates that the suit "shall be deemed an action against the United States" under the FTCA and "the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1)-(2). Here, the Director of the Justice Department's Torts Branch duly certified that the defendant was acting within the scope of his employment in connection with the events underlying plaintiff's suit. The United States, therefore, should have been substituted as defendant, and the suit should have been permitted to "proceed in the same manner as any action against the United States [under the FTCA] * * * and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4).

We now address the points of debate on this issue. They are as follows: whether Behrens was a federal employee for purposes of the Federal Tort Claims Act; and whether he was acting within the scope of his authority at the time the actions alleged took place. If these

questions are answered in the affirmative, then substitution of the United as defendant should have been permitted by the district court.

1. **Behrens is a federal employee for FTCA purposes.**

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States); *Colony First Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Co.*, 643 F. Supp. 410, 416 (C.D. Cal. 1986) (both Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation federal agencies for FTCA purposes); *Kohlbeck v. Kis*, 651 F. Supp. 1233, 1236 (D. Mont. 1987) (FSLIC federal agency for FTCA). See also, *Federal Sav. & Loan Ins. Corp. v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969); *Safeway Portland E.F.C.U. v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1215 (9th Cir. 1974).

Just as it is clear that these are federal agencies, so too is it manifest that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution carrying out governmental functions. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, an "employee of the government" is defined as "officers or employees of any federal agency, members of the military or naval forces of the United States", and

most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

Moreover, in this Circuit, "[t]he word 'employee' [under the FTCA] is to be read as having the same general meaning in the Act as the term 'servant' has in the body of rules relating to the doctrine of respondeat superior," *Bruck v. United States*, 338 F.2d 427, 428 n. 2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965) (citing Restatement (Second) of Agency, Section 220 (1958)). Behrens' appointment fulfills the criteria set forth in the Restatement (Second) of Agency, Section 220(2), which provides that in determining if an individual is acting as the servant of another, a court is to consider, *inter alia*, the extent of control which the master exercises over the work; whether the employee or the employer supplies the tools and the place of work; whether the work is part of the regular business of the employer; whether the work is done under the direction of the employer or without supervision; and whether the parties believed they were entering into a master/servant relationship. Applying these factors here results in a finding that Behrens was a federal employee, for the Bank Board had plenary control over his activities, supervised his work, and understood

he was to be an employee. See, *e.g., United States v. Becker*, 378 F.2d 319 (9th Cir. 1967); *Letnes v. United States*, 820 F.2d 1517 (9th Cir. 1987).[9] Other courts, in precisely the same situation presented here, have found that the Supervisory Agent was an employee of the Bank Board, and have ordered substitution of the United States as defendant, pursuant to the Westfall Act. See, *e.g., Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F.Supp. at 687.

2. Behrens was Acting Within the Scope of His Employment.

The remaining question is whether Behrens was acting with the scope of his employment when he advised against employing Pelletier until the BHSL investigation had been completed. The district court determined, in dissolving an earlier entered protective order, that "whether [Behrens] acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." This conclusion is wrong, for the following reasons.

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[9] The fulfillment of these conditions also demonstrates that Behrens met the criteria under California law for a borrowed servant. The borrowed servant doctrine has been applied by the Ninth Circuit in cases arising under the FTCA in order to establish the liability of the United States. See, *e.g. United States v. N.A. Degerstrom, Inc.*, 408 F.2d 1130 (9th Cir. 1969) (operator of heavy equipment leased by government complete with operators, was loaned servant and thus a federal employee under FTCA). See also, *Dornan v. United States*, 460 F.2d 425 (9th Cir. 1972).

a. First, the Attorney General's designee certified that Behrens was acting within the scope of his employment in this case. The burden of proof has thus become the plaintiff's burden; he must establish that the scope determination is erroneous.

b. Second, the judgment of the Attorney General's designee regarding scope deserves substantial deference from the courts. While the issue of scope is ultimately a matter of state tort law, underlying that ultimate issue are determinations on matters that are uniquely within the purview of the Executive Branch – *i.e.*, defining the activities that are within the employer's "business," and ascertaining the range of responsibilities entrusted to the individual employee. These are matters that are governed by the agency's statutory responsibilities, as well as the regulations and internal directives of the agency itself, often including written descriptions of the scope of individual duties. Executive agencies are entitled to great deference in construing and applying such materials. *See generally, Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). When the Justice Departmen, in consultation with the agency in question, determines that an individual was in fact acting within the scope of his duties as defined by his employing agency, that is a determination to which the courts should give great weight. An affirmative scope determination is, moreover, a step that the Attorney General is not apt to take lightly, since it unilaterally opens up the federal treasury to the possibility of liability that it would not otherwise face.

c. Finally, it is clear that Behrens *was* acting within scope of his authority when he recommended that the

decision on plaintiff's appointment as president of Pioneer be deferred. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, § 107, at 743 (1986).[10] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Under Board regulations concerning new banking institutions such as Pioneer, (*i.e.* "*de novo* applicants for insurance"), Behrens was empowered to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the

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[10] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.* 41 Cal. 3d 962, 719 P.2d 6767, 227 Cal Rptr. 106 (1986).

applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable," *id.*, Behrens was acting within the scope of his authority, in refusing to approve the plaintiff as Pioneer's president; for there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer.[11] Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." (R.E. 27). In such circumstances, he clearly was acting within the scope of his authority. This Court, in *In Re Complaint of McLinn*, 744 F.2d 677, 683 (9th Cir. 1984), recognized (citing the Restatement) that:

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[11] The Restatement provides that "[t]o be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency, Section 229. Moreover, "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment," *id.* at Section 230. Indeed, *"[a]n act may be within the scope of employment although consciously criminal or tortious." Id.* at Section 231 (emphasis added). These principles, which reflect the common law of *respondeat superior*, fully support our position that the defendant was acting within the scope of his employment when he committed the alleged torts – even the intentional torts of interference with contract rights and intentional infliction of emotional distress. See, *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.) (motive not relevant to scope of employment inquiry).

> An employee's conduct is within the scope of employment if it is of the kind he was employed to perform, it occurs substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to further the master's business.

The Tenth Circuit, in *Nietert v. Overby*, has reached a similar conclusion:

> The "scope" of an official's duty is not narrowly defined. An act will fall within the official's scope of authority if it "bear[s] some reasonable relation to and connection with the duties and responsibilities of the official," and is not manifestly or palpably beyond the official's authority. * * *

816 F.2d at 1466 (citations omitted; quoting *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967)). Thus, actions are within the scope of a federal employee's duties if they have "more or less connection with the general matters committed by law to his control or supervision." *Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938)). See, *Cross v. Fiscus*, 830 F.2d 755, 757 (7th Cir. 1987) (an official is acting within the outer perimeter of employment when "the occasion * * * would have justified the act, had [the federal employee] been using his power for any of the purposes on whose account it was vested in him").

There can be no doubt that the actions which plaintiff complains of had more or less connection with the general matters committed by law to the defendant's control or supervision and that, accordingly, the defendant was

acting within the scope of his authority.[12] Since this case involves a federal employee acting within the scope of his employment, substitution under the Westfall statute was *mandatory*. The district court judgment to the contrary should be reversed.

II.

CONGRESS' COMPREHENSIVE REGULATION OF THE THRIFT INDUSTRY IS A SPECIAL FACTOR BARRING A BIVENS REMEDY

The decisions of this Court and the Supreme Court indicate that there is no *Bivens* remedy available to the plaintiff in this case. This is because the government's profound interest in a sound thrift system has resulted in comprehensive legislation regulating that industry. This comprehensive legislation is a "special factor" counselling against judicial creation of a *Bivens* remedy.[13]

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[12] We recognize that in *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), this Court held that the Westfall Act's substitution provision applies only where the FTCA provides an effective alternative remedy for the plaintiff. But here, unlike the situation in *Smith*, the FTCA in fact does provide an effective alternative remedy. The plaintiff in our case would, if substitution were allowed, proceed with his case against the United States on the common law tort counts alleged. While certain of his claims, such as the claim of interference with contract rights, might be barred by Section 2680(h), plaintiff would likely have a viable FTCA action against the United States on his allegations of common law negligence.

[13] This Court has pendent appellate jurisdiction to hear the "special factors" issue, which is inextricably bound up with the qualified immunity issue. See, *Le Bid v. Hanson*, 894 F.2d 1124 (9th Cir. 1990).

A. The Supreme Court's 1988 decision in *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988), has made it indisputably clear that Congress' complete regulation of an area is a special factor arguing against court created *Bivens* remedies – whether or not the Congressional scheme affords an "adequate" remedy to the litigant. As this Court most recently stated, in exploring the special factors analysis, courts "should not create *Bivens* remedies when the design of a government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration." *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990) (Slip op.at 973). The reasoning of *Chilicky*, which grew out of the social security benefits statute, and the reasoning of earlier Supreme Court cases such as *Bush v. Lucas*, 462 U.S. 367 (1982), which involved the federal Civil Service Reform Act, are fully applicable here. As this Court observed in *Le Bid*, "*Bush's* reasoning extends beyond the civil service context, and *Chilicky's* reasoning extends beyond the Social Security benefits context." Slip op. at 973. In *Le Bid* the reasoning was extended to the Internal Revenue Code; in this case, it should be extended to the statutory scheme governing savings and loan institutions.

B.1. Banks and thrift institutions in this country are subject to comprehensive regulation and control by federal regulatory agencies, the purpose of which is to ensure the safety of deposits in federally-insured institutions and thus protect and enhance public confidence in the nation's banking system. Recognizing that the character and quality of management is of critical importance to these goals, Congress has given the Bank Board and

FSLIC broad authority to determine who may own and operate federally-insured thrift institutions. The Change in Savings and Loan Control Act, 12 U.S.C. § 1730(q), for example, forbids the acquisition of an insured institution without FSLIC approval. 12 U.S.C. §1730(q)(1). An applicant for such approval is required to provide the FSLIC with detailed information concerning the individuals on whose behalf the acquisition is to be made, including their identity, business background, experience, business activities and affiliations, financial status, criminal record, and involvement in any material administrative proceedings. *Id.* § 1730(q)(6)(A) and (B). Congress has specifically directed the FSLIC to "conduct an investigation of the competence, experience, integrity, and financial ability of each person" on whose behalf the proposed acquisition is to be made and to make an independent determination of the accuracy and completeness of the information submitted on behalf of such persons. *Id.* § 1730(q)(B)(i) and (ii). The FSLIC may disapprove a proposed acquisition if it finds that "the competence, experience, or integrity of any acquiring person or any of the proposed management personnel indicates that it would not be in the interest of the depositors of the institution or in the interest of the public to permit such person to control an institution." *Id.* §1730(2)(q)(7)(D).

By the same token, Congress has authorized duly appointed Supervisory Agents to act broadly in the agency's interests in order to insure the competency and integrity of management at new banking institutions. See, 12 U.S.C. 1726(c). When new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new

entity's *bona fides*. See generally, 12 C.F.R. 571.6. The Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.*

2. While Congress has sounded the same theme throughout its banking statutes, *i.e.* prevention of corruption and dishonesty, it has not provided remedies for all actions taken with respect to bank officers which may be deemed by those the officers to be adverse. When the FSLIC believes that an officer or director of an insured institution has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and-desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g) (1) and (2).[14]

In such circumstances, Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described. An adverse agency decision under the change in control provisions may be contested at a formal on-the-record administrative hearing, followed by judicial review at the appellate level. 12 U.S.C. § 1730(q)(4) and (5). Similarly a notice of intent to remove an officer or

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[14] The agency has the same duty when a thrift officer or director has been indicted or otherwise charged with a crime involving dishonesty or breach of trust. *Id.* § 1730(h).

director can be challenged at a formal administrative hearing, with judicial review of a final removal order. *Id.* § 1730(g)(5). An officer or director subjected to an immediate suspension order may apply to the appropriate district court for a stay of such order pending completion of the administrative proceedings. *Id.* § 1730(g)(6). A removal or suspension order based on an indictment or other criminal charge is subject to specified review at the administrative level. *Id.* § 1730(h)(2).

3. In the instant case, the statutory provision that authorized defendant Behrens, actions is 12 U.S.C. § 1726(c), which governs applications for FSLIC insurance. In that section, as in those described above, Congress' concern for the soundness of the thrift system and the character and quality of management is again apparent. In Section 1726(c), Congress expressly directed the FSLIC to "reject the application of any applicant [for FSLIC insurance] if it finds that * * * [the applicant's] financial policies or management are unsafe * * * [or] that the character of management of the applicant * * * is inconsistent with economical home financing or with the purposes of this subchapter."[15]

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[15] The FSLIC's regulations governing *de novo* applicants for FSLIC insurance, such as Pioneer, were adopted to implement this statutory mandate. *See* 12 C.F.R. § 571.6(b). In accordance with the statute, these regulations require an applicant for insurance of accounts to "submit a business plan describing its management, operations, investments and financial projections for the first three years of operation. The business plan shall provide for the continuation or succession of competent management subject to the approval of the Principal Supervisory Agent. . . . " *Id.* § 571.6(b)(2)(i) (1986).

As with the change-of-control and removal powers discussed above, the FSLIC's determination to reject an application for insurance of accounts due to the character of management could also have an adverse impact on the individual officer or director involved. Significantly, however, Congress has *not* provided to the individual affected any administrative or judicial review of the FSLIC's decisions under Section 1726(c). Given its demonstrated awareness elsewhere of the interests of individual thrift officers and directors whose qualifications might be called into question, it is apparent that Congress' decision not to afford a hearing under Section 1726(c) was not inadvertent. Rather, as in the other provisions discussed, Congress' choice reflects its careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. In this particular instance, Congress determined that the overwhelming public interest in ensuring the financial health of the FSLIC's insurance reserves justified any possible incidental burden on private interests.

Creating a *Bivens* remedy here would, therefore, stand Congress' carefully-crafted statutory scheme on its

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The requirement for supervisory approval of management is one of the routine conditions for FSLIC insurance of *de novo* institutions. Bank Board Resolution No. 84-164 (March 29, 1984), which authorized insurance of accounts for Pioneer's predecessor in interest, was expressly conditioned on the institution's agreement to employ a "qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent" for at least the first three full years of operation. Bank Board Resolution No. 84-164, page 6, ¶ 10(p) (R.E. 27).

head. "When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Chilicky*, 108 S. Ct. 2468.

C. Plaintiff may argue, of course, that since the statute provides no administrative remedy for the failure to approve a *de novo* bank's choice of president, the courts should imply such a remedy via *Bivens*. Yet it has long been settled that the adequacy of a remedy, indeed the existence or non-existence of a statutory remedy, is not relevant when a court is applying the special factors analysis. The Supreme Court in *Chilicky* held that once the special factor has been found, *it is irrelevant* whether the plaintiff has an adequate administrative remedy under the statute. This Court in *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989), recognized the force of *Chilicky*, Reversing its earlier position on the availability of a *Bivens* remedy,[16] this Court squarely held that "[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment, because 'Congress is the body charged with making the inevitable compromises required in the design of a massive and complex program.' " *Id.* citing *Chilicky*, 108 S. Ct. at 2470-71. More recently, in *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), this Court ruled that "*Chilicky* emphasized the

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[16] See *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated and remanded*, 108 S. Ct. 2861 (1988).

comprehensiveness of the [the statute at issue] and indicated that courts should defer to the expertise of Congress in matters such as the adequacy of remedial mechanisms provided by statute."

Finally, only one month ago, this Court applied *Chilicky* in *Le Bid*, holding that the IRS statute barred *Bivens* relief. In its ruling, the Court cited the observation of the Supreme Court in *Bush v. Lucas* that Congress is in "in a better position to decide whether or not the public interest would be served by creating [Bivens liability]." *Le Bid*, Slip op. at 974, quoting *Bush*, 462 U.S. at 390. This trenchant observation is most applicable here. Congress, in regulating the nation's thrift industry, has not inadvertently determined that the public interest is best served by a statute which affords remedies to officers and directors of banks who are removed, but not to mere applicants who not approved for their positions. Under this Court's precedents, and those of the Supreme Court, the special factor of Congress' comprehensive regulation of the thrift industry thrift indicates that no Bivens remedy is available to the plaintiff. On this point too, the district court erred.

III.

DEFENDANT BEHRENS WAS ENTITLED TO QUALIFIED IMMUNITY

Even if the plaintiff had a *Bivens* remedy, the federal defendant is nonetheless entitled to qualified immunity from suit.

The Supreme Court has made it clear that government officials "generally are shielded from liability for

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court reiterated this principle. The question a court must ask in a case raising qualified immunity is whether a reasonable official "in light of clearly established law and the [factual] information [he] possessed," could reasonably have believed that his behavior was lawful. Under this test it is evident that the district court erred in its assessment of the Behrens' entitlement to immunity. Behrens was only prudently carrying out the duties of his office; he could not have reasonably believed that he was acting illegally.

A. As a threshold matter we note that Behrens did not fire Pelletier; he merely wrote to the Pioneer bank, stating that because Pelletier was under investigation on quite serious charges, the agency was "unable at this time to proceed with the application until that inquiry is complete." (R.E. 28). Prudence required that Pelletier "step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete." *Id.* It was Pioneer, not Behrens, that subsequently decided it would be best to fire Pelletier, rather than await the ultimate outcome of the FSLIC investigation.

This fact by itself should answer the argument that Behrens is not entitled to immunity. Behrens took no action violative of constitutional rights, but simply carried out the statutory and regulatory requirements of his office. Therefore, he *a fortiori* took no action which he

reasonably should have known violated plaintiff's clearly established rights.

B. Behrens' lack of culpability, and the reasonableness of his actions, is evident from the regulatory scheme under which he operated. When new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* In this case the bank in question, Pioneer Savings & Loan, had a predecessor in interest named South Coast Savings & Loan Association. South Coast had received Board approval for insurance of its accounts, but one of the conditions of approval was that the institution:

> provide for employment of a qualified fulltime executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following * * * *the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval.* [R.E. 27] (Emphasis Added)

Since Pioneer was required to obtain approval of its new president-designate from the Principal Supervisory Agent, who delegated his authority to Supervisory Agent

Behrens, and since Behrens was charged by statute and regulation with rejecting an applicant for insurance, or its appointees, if the character of the management is "questionable," it should be clear that Behrens was not only acting reasonably, but pursuant to statute and regulations, (as well as the agreement with Pioneer's predecessor in interest) when having learned of the ongoing FSLIC investigation of a bank Pelletier had served as a senior loan officer, he declined to approve him as President "at this time."

C. Pelletier had no clearly established property rights in his potential permanent employment with Pioneer. The point was well made by the Fifth Circuit in its recent decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989). In a factual situation remarkably similar to the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established property right in employment where the employment was "contingent upon regulatory approval."

Similarly, in *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986) an unsuccessful applicant for an administrative law judge position brought suit alleging a due process violation. He was rebuffed by the D.C. Circuit, which held that "[t]he right to a hearing does not attach every time the government denies an employment application."

Here, of course, it was the private party, Pioneer, which ultimately decided to fire Pelletier, rather than await the outcome of the FSLIC investigation. Behrens only advised that he could not approve Pelletier as president "at this time." In these circumstances, it its absurd to contend that on the basis of the information known to him at the time, Behrens should reasonably have understood that by writing the letter to Pioneer he was violating clearly established law.[17]

D. Plaintiff asserts not only a violation of procedural due process, but a violation of a liberty interest. However, his complaint fails to allege any specific acts committed by Behrens which denied him liberty. Plaintiff

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[17] This Court's decision in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987), holding that an individual may have a property interest in private employment, is not controlling. In *Mackey*, the Court found that the plaintiff had a legitimate claim of entitlement to his job based on state law. In this case, the plaintiff has never asserted more than a "reasonable expectation" that he would be approved as president of Pioneer. Moreover, in *Mackey* the Court suggested that the defendant was acting outside the scope of his employment; here Behrens was authorized by statute and regulation to do what he did.

Also, in *Mackey* the defendant ordered the plaintiff fired; here there was no such order – the defendant merely declined to approve the plaintiff while the FSLIC investigation was continuing.

Finally, the *Mackey* ruling post-dates the Behrens letter in the instant case, which was written in 1986; there was a vigorous dissent in *Mackey*, over the existence of a property interest in private employment, which casts doubt on whether the law was clearly established; and the *Mackey* case is again pending before this Court on the immunity issue (Nos. 89-35233, 89-35270), hence there is the possibility of a reversal on the immunity issue.

makes only the very general and unsupported charge that all the defendants engaged in a continuing conspiracy to prevent plaintiff from finding employment in the financial institutions industry.

Unfortunately, the plaintiff cannot make this sort of claim carry him past the motion to dismiss or summary judgment stage of a qualified immunity suit. This Court has repeatedly held, most recently in *Di Martini v. Ferrin*, where similar allegations were made, that "a plaintiff is not entitled to survive on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. 889 F.2d at 927. This is in keeping with the general rule that "[m]ere allegations, without more, do not create a question of fact as to qualified immunity." *Ginter v. Stallcup*, 869 F.2d 384, 388 (8th Cir. 1989). See generally, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). See also, *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 931 (7th Cir. 1989).

Furthermore, in *Connelly*, the Fifth Circuit rejected the plaintiff's asserted liberty interest in "pursuing work in his chosen vocation," expressly declining to decide if such a constitutional right exists. 786 F.2d at 1214. That the court found the law unsettled on this issue conclusively establishes that Behrens cannot have violated a clearly established right, even if he acted in concert to keep Pelletier out of the thrift industry. Under *Connelly's* reasoning, Behrens is entitled to qualified immunity on all facets of the constitutional claims.

Finally, it is well-established that before the government can be accused of infringing a liberty interest, it

must be shown not only that any information surrounding a dismissal of an employee was sufficiently damning, but that the government participated in the dissemination of this information to the public. See, *Bishop v. Wood*, 426 U.S. 341, 348 (1976). The letter in dispute from Behrens to the Pioneer bank, was marked "confidential," and was not disseminated to anyone. Nor does the plaintiff allege dissemination. Therefore, no liberty interest was violated.

E. The district court's denial of qualified immunity may have resulted from doubts over Behrens' employment status.[18] Behrens was not paid by the federal treasury, but by the Federal Home Loan Bank of San Francisco, a privately owned, quasi-governmental entity. However, this does not affect his status as a Supervisory Agent of the Board. Under Section 17(a) of the Federal Home Loan Bank Act, 12 U.S.C. 1437(a), the Bank Board has authority to delegate certain of its supervisory and examination functions to persons who are officers and employees of the regional banks (not to the regional banks themselves). The delegation of authority is formally carried out by the "Principal Supervisory Agent," and those who are delegated these powers are denominated "Supervisory

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[18] The lower court's September 11, 1989 order states that "although Behren may not be a private party, whether he acted outside his authority and in an egregious manner cannot be determined until discovery is conducted and evidence presented." (R.E. 29). The October 6, 1989 order denied the motion for summary judgment as premature, "given the status of discovery." (R.E. 32). Read together, the orders seem to indicate that the court rejected qualified immunity because it perceived factual issues relating to whether Behrens acted as a private party.

Agents." See, 12 C.F.R. 501.10. Board regulations expressly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." *Id.* Therefore, Behrens was an agent of the United States and entitled to qualified immunity.

We recognize that in *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989), this Court refused to accord private parties a qualified immunity defense. However, the decision in *Trotter*, for the reasons we have just enumerated, has no applicability here. *Trotter* involved a private engineering firm's study of the lands surrounding a naval air station in Hawaii. The owners of those lands claimed that the study and the actions it recommended "impacted and blighted" their property. 869 F.2d at 1313. Noting that the Supreme Court has not decided whether to accord private defendants immunity in 1983 and *Bivens* suits, the Court extended its earlier statement, in *Howerton v. Gabica*, 708 F.2d 380, 385 n. 10 (9th Cir. 1983), that private defendants in 1983 suits are not eligible for qualified immunity.

This case is much different than *Trotter*. Behrens was not a government contractor performing an assigned task, but a duly appointed Supervisory Agent clothed with a federal agency's authority. As we have already emphasized, he was carrying out federal functions pursuant to federal regulations and statutes. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus in a position to claim qualified immunity from suit – an immunity which

this Court, on the basis of the arguments made above, should grant him.

That Behrens was a federal employee is evident not only from the factors we have just discussed, but also from the factors discussed in Point I, *supra*, at 21-23, in the context of substitution of the United States as defendant under the Westfall statute. Plainly, Behrens is not a federal employee for one purpose and not for another – for absolute immunity and not for qualified immunity. By statute, by regulation, by case law, he is a federal employee fully entitled to immunity from both common law and constitutional torts.[19]

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[19] The district court ruled that the two actions forming the basis of the plaintiff's complaint – the letter written by Behrens and his subsequent firing by Pioneer bank – were time barred under the applicable California one year statute of limitations. See, Cal. Civ. Proc. Code, Section 340(3); *Keller v. United States*, 667 F. Supp. 1351, 1360 (S.D. Cal. 1987). The statute of limitations issue is not presently before this Court. However, we note that there is Ninth Circuit precedent casting some doubt on the limitations ruling below. See, *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989). The precedent of this Circuit, however, runs counter to the weight of judicial authorities from other courts. See, *Wilson v. Garcia*, 471 U.S. 261 (1985); *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2099 (1989); *Chin v. Bowen*, 833 F.2d 21 (2d Cir. 1987); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully Submitted,

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MARCH 1990

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[Statement Of Related Cases Omitted In Printing]

[Statutory Addendum Omitted In Printing]

COURT OF APPEALS' ORDER DENYING STAY, EOD MARCH 14, 1990

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al. Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 DC # CV-89-0969-RMT Central California ORDER (Filed Mar. 14, 1990)

Before: WALLACE and LEAVY, Circuit Judges

Appellant's motion to stay the September 11, 1989 and October 6, 1989 district court orders are denied. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983).

PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION, EOD APRIL 17, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER

Plaintiff-Appellee,

vs.

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT M. TAKASUGI

DIST CT NO. CV 89-0969-RMT (Tx)

BRIEF OF APPELLEE ROBERT J. PELLETIER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. 89-56265 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx)

CERTIFICATE OF INTERESTED PARTIES
REQUIRED BY NINTH CIRCUIT RULE 28-2

The undersigned, counsel of record for Robert J. Pelletier certifies that the following have an interest in the outcome of this case:

1. Robert J. Pelletier, Plaintiff
2. John W. Behrens, Defendant
3. United States of America, Defendant
4. Federal Home Loan Bank Board, Defendant
5. Federal Home Loan Bank of San Francisco, Defendant
6. Federal Savings and Loan Insurance Corporation, Defendant in related case pending in the Court below.

Dated: April 12, 1990

LAW OFFICES OF SAMUEL T. REES

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorney for Plaintiff-Appellee
Robert J. Pelletier

TABLE OF CONTENTS

Page

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF JURISDICTION..... 2

STATEMENT OF THE CASE..... 2

Nature of the Case..... 2

Statement of Facts..... 5

ARGUMENT 9

Limited Jurisdiction Exists in this Court 9

Behrens Conduct Violated Clearly Established Rights 14

Qualified Immunity is Not Available to Behrens 20

Federal Regulations Does Not Preempt the Bivens Claims 21

Substitution of the USA Should Not Be Ordered 23

CONCLUSION 26

STATEMENT OF RELATED CASES 26

TABLE OF AUTHORITIES

Page

Cases:

Adickes vs. S.H. Kress & Co., 398 U.S. 144 (1970) 14

Bautista vs. Jones, 25 Cal.2d 746 (1945) 19

Berqquist vs. Count of Cochise, 806 F.2d 1364 (9th Cir. 1986) 14

Carlson vs. Green, 446 U.S. 14 (1980) 22

De La Cruz vs. Tormey, 582 F.2d 45 (9th Cir. 1978) 14

DeMirjian vs. Ideal Heating Corp., 112 Cal.App.2d 251 (1952) 25

Endler vs. Schutzbank, 68 Cal.2d 162 (1968)..... 18

F.E. Trotter, Inc. vs. Watkins, 869 F.2d 1312 (9th Cir. 1989) 4, 20, 21

Greene vs. McElroy, 360 U.S. 474 (1959)..... 17

Greenlaw vs. California Department of Benefit Payments, 413 F.Supp. 420 (E.D. Cal 1976) 16

Keker vs. Procunier, 398 F.Supp. 756 (E.D. Cal. 1975).....15, 16

KGB, Inc. vs. Giannoulas, 104 Cal.App.3d 844 (1980) 19

Manhattan Beach Police Officers Ass'n vs City of Manhattan Beach, 881 F.2d 816 (9th Cir. 1989)..... 2, 10, 12, 14

Merritt vs. Mackey, 827 F.2d 1368 (9th Cir. 1987) 17, 18

Mitchel vs General Elec. Co., 689 F.2d 877 (9th Cir. 1982)..... 1

Mitchell vs. Forsyth, 472 U.S. 511 (1985) .. 2, 10, 12, 14

Morrison vs. Jones, 607 F.2d 1269 (9th Cir. 1979)..... 16

New Method Laundry Co. vs. MacCann, 174 Cal 26 (1916) 19

Pacific American Fisheries vs. Mullaney, 191 F.2d 137 (9th Cir. 1951)..... 15

Purdy & Fitzpatrick vs. State of California, 71 Cal.2d 566 (1969) 19

Ross vs. Goins, 51 Cal.App. 412 (1921)..... 25

Scheuer vs. Rhodes, 416 U.S. 232 (1974)..... 15

Schowengerdt vs. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987).....22, 23

Schwartzman vs Valenzuela, 846 F.2d 1209 (9th Cir. 1988) 10

Schwiker vs. Chilicky, ___ U.S. ___; 108 S.Ct. 2460 (1988) 23

Shah vs. County of Los Angeles, 797 F.2d 743 (9th Cir. 1986) 14, 19

Townsend vs. Los Angeles County, 49 Cal.App.3d 263 (1975)..... 18

Truax vs. Raich, 239 U.S. 33 (1915)..... 17

United States vs. Briggs, 514 F.2d 794 (5th Cir. 1975).....17, 18

United States vs. City of Redwood City, 640 F.2d 963 (9th Cir. 1981)..... 14

Wisconsin vs. Constantineau, 400 U.S. 433 (1972) 17

Statutes:

5 U.S.C. § 552.....2, 19

5 U.S.C. § 701 et seq..... 9

5 U.S.C. § 702..... 2

12 U.S.C. § 1431, 1437 2

12 U.S.C. § 1464.....19, 21

12 U.S.C. § 1726..... 21

12 U.S.C. § 1730 ..... 6, 8, 13, 19, 21

28 U.S.C. § 1331 2

28 U.S.C. § 1927 ..... 1, 2, 10

28 U.S.C. § 2201, 2202 2

28 U.S.C. § 2679 ..... 12, 24, 25

28 U.S.C. § 2680 25

California Civil Code §§ 2339, 2343 25

California Constitution, Art 1, § 1 19

Ninth Circuit Rule 28-2 ..... 1, 11

Pub. Law No. 101-73, 101 Stat. 183 20

Regulations:

12 C.F.R. § 501.11 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee vs. JOHN W. BEHRENS, Defendant-Appellant.	)	NINTH CIRCUIT NO. 89-56265 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx)

BRIEF OF APPELLEE ROBERT J. PELLETIER

STATEMENT OF ISSUES PRESENTED

Plaintiff and Appellee Robert J. Pelletier does not agree with the Brief of Defendant and Appellant John W. Behrens regarding the "questions presented" and submits the following:

1. Does this Court have jurisdiction to determine any of the questions presented in the Brief of Appellant?

2. Did the Court below commit error when if failed to find on a motion to dismiss or motion for summary judgment before discovery that Behrens was not entitled to qualified immunity?

3. Is Behrens and/or his counsel subject to sanctions and Pelletier's attorneys' fees and costs by (i) failing to reference his brief to the Record on Appeal as required by Ninth Circuit Rule 28-2 and *Mitchel vs General Elec. Co.*, 689 F.2d 877 (9th Cir. 1982) and (ii) presenting issues which are not the proper subject of an interlocutory appeal pursuant to 28 *U.S.C.* § 1927?

STATEMENT OF JURISDICTION

Jurisdiction exists in the District Court pursuant to 28 *U.S.C.* § 1331; 5 *U.S.C.* § 552A(g)(1); 5 *U.S.C.* § 702; 12 *U.S.C.* § 1431 and 1437; 28 *U.S.C.* § 2201 and 2202; and pendant jurisdiction.

Behrens appeal brief attempt to raise three issues for appeal to this Court. Only a part of one of the issues is properly before this Court.

The issue properly before this Court is the issue of qualified immunity. The United States Supreme Court

and this Court has held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*, 472 U.S. 511, 527-530 (1985) and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach*, 881 F.2d 816, 817-818 (9th Cir. 1989). That issue is whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute.

Pelletier asserts that there is no jurisdiction on the other issues raised in the Brief of Appellants. A detailed discussion of this position is set forth at the commencement of the Argument, below.

STATEMENT OF THE CASE

Nature of the Case

This brief is submitted by Plaintiff and Appellee Robert J. Pelletier ("Pelletier") in response to the brief of Defendant and Appellant John W. Behrens ("Behrens"). The underlying action is one seeking injunctive relief and damages arising out of Behrens' causing Pelletier to be fired from his job and blackballed from the thrift industry. The complaint alleges claims for violations of Constitutional rights, federal laws and common law torts.

This is an appeal by Behrens from the denial of his motion to dismiss the complaint and for summary judgment before discovery. (Clerk's Record 31). The motion to dismiss was granted in part and denied in part by the Court below and the motion for summary judgment was denied without prejudice as premature. (Excerpt P. 31).

No meaningful discovery has yet been taken in this action. Rather, Behrens has gone so far as to evade service of process for discovery. (Clerk's Record 15).

The question for review is whether Behrens will be permitted to escape personal responsibility for his actions which caused Pelletier to be summarily fired from his position as the managing officer of a savings and loan association and thereafter to be blackballed from further employment in the industry. Essentially, Behrens, claiming to have been acting on behalf of a governmental agency but without authority to do so, destroyed Pelletier's career in the financial institution field by taking action without explanation, evidence or any kind of due process, all of which would have been required were the governmental agency to have taken the action itself.

Behrens pursues this appeal in order to eliminate through the back door certain claims found by the Court below to have been stated against him which claims are not permitted against the governmental defendants below. Essentially, these are claims for intentional torts, punitive damages and interference with contract all of which are barred against the governmental defendants. If Behrens is successful, Pelletier will lose his ability to recover on these claims against the governmental defendants. Behrens omits this discussion of the true motive for this appeal and the effects thereof.

Behrens admits by his brief that he is neither a federal officer or even a federal employee. Rather, he is a private party who at the time was employed by the Federal Home Loan Bank of San Francisco ("Bank") to perform certain supervisory duties delegated to the Bank

by the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FHLBB and the FSLIC are both federal agencies.

This Court has recently held that a claim for qualified immunity is not available to a private party such as Behrens. *F.E. Trotter, Inc. vs. Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989). Additionally, substitution of the United States of America is not available to private parties who commit willful torts since such torts are outside the scope of any relationship which would allow for substitution.

Statement of Facts

The facts are contained in the First Amended Complaint (Excerpt P. 1 et seq.) and/or Behrens' opening brief herein. References are to paragraphs in that amended complaint or page numbers of that brief.

Pelletier has pursued a profession and held employment in the savings and loan industry in various executive capacities for over thirty years and until Behrens took the action which continues to cause him to be unable to be employed in that industry even to this day. (Complaint ¶ 8). While it is true that this industry is the subject of much criticism today, the problems of this industry are not of Pelletier's conduct and he should not be required to come before this Court as a second class citizen stripped of his Constitutional rights.

In 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He served as the

Senior Vice President in charge of the Major Loan Division of BHSL and the Senior Loan Committee until his resignation in March, 1984. This resignation was given because Pelletier did not wish to relocate his office as requested by BHSL. Pelletier was never a member of the BHSL Board of Directors nor was he ever the managing officer of that institution. (Complaint ¶ 9-13).

While BHSL was subsequently seized by the FSLIC for insolvency in April, 1985, Pelletier was not the subject of any administrative or legal action at the time Behrens committed the acts alleged in the complaint. It also does not appear that Behrens played any role in supervising BHSL, while Pelletier was employed. (Excerpt P. 20).

Behrens at this time was a salaried employee of the Bank. He was not then nor at any times alleged in the complaint an employee of the FHLBB or the FSLIC. On March 17, 1984, about the time of Pelletier's departure from BHSL, Behrens was appointed an agent of the FHLBB and FSLIC. The scope of his delegated duties is set forth in 12 *C.F.R.* § 501.11. This authority does not permit Behrens to fire savings and loan executives, although FHLBB/FSLIC has such authority by statute. 12 *U.S.C.* §§ 1730 (g),(h) and (q).

In mid-1984, Pelletier was hired by Equitable Savings and Loan Association of Orange County as its managing officer. Pelletier's employment was approved by both federal and state regulatory offices. Pelletier remained in this capacity until he was again asked to relocate his home in 1985. (Complaint ¶ 14-16).

Pelletier was then hired by Pioneer Savings and Loan Association ("Pioneer") of Orange County as its managing officer. Pioneer had received insurance of its accounts from the FSLIC in 1984. Although there is no statutory authority for doing so, the FSLIC purported to require that Pioneer secure approval of any new managing officer by the Principal Supervisory Agent for the district of the FHLBB and FSLIC for a period of three years. The Principal Supervisory Agent in Pioneer's district was James Cirona, the president of the Bank. Behrens has never been a Principal Supervisory Agent. (Excerpt P. 20-27 ¶ (p)).

Pelletier's work and performance while at Pioneer was well received by not only the federal and state regulatory agencies, but also Pioneer's Board and outside accountants, Peat, Marwick, Mitchell & Company. (Complaint ¶ 17).

As noted above, there is no statutory authority for imposing a condition subsequent to the issuance of insurance of accounts of managing officer approval. The statutory right of approval is *before* the insurance of accounts is granted. FSLIC has the right, however, to terminate such insurance in the event of unsafe or unsound conditions at that institution. FSLIC has never contended that Pelletier's performance at Pioneer placed Pioneer in an unsafe or unsound condition and indeed makes no criticism of Pelletier's performance while at Pioneer.

Nevertheless, Pioneer sought approval of Pelletier's position from the Principal Supervisory Agent, Mr. Cirona. Mr. Cirona took no action on this application for a material period of time. (Complaint ¶ 18). Indeed, Mr. Cirona has not to this date, that Pelletier is aware, taken

any action on this application. In his brief, Behrens asserts that his conduct was in response to the application. (Brief P. 33).

In May, 1986, Behrens, acting outside of his lawful authority and with the knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board (the "Behrens Directive"). Fairly read that Directive required Pioneer to terminate Pelletier if he did not resign and replace him, without delay, with a new managing officer. (Excerpt P. 28 and Complaint ¶ 21). It is unknown at present what other acts were taken by Behrens to accomplish his purpose. Behrens has refused to submit to discovery, even going so far as to move this Court for a stay pending appeal, which was denied on March 14, 1990. (Interestingly, Behrens moved for summary judgment in the Court below while also refusing to submit to discovery so that factual opposition could be presented. Fairly read, the denial of summary judgment was made to permit discovery and not on the merits.)

The Behrens Directive does not set forth a single act of wrongdoing by Pelletier. It does not criticize his performance while at Pioneer for approximately one year. It says that Pelletier is being investigated for his role in BHSL, which by that time had been seized. It thus implies that Pelletier was one of the causes for BHSL's collapse. Since the FHLBB on whose stationary Behrens wrote his Directive has the power of life and death over the institution, Pioneer took the prudent step of firing Pelletier, when he refused to resign. (Complaint ¶ 21).

Congress has provided a mechanism for removing a savings and loan officer. 12 *U.S.C.* §§ 1730 (g),(h) and (q). This mechanism requires a determination by the FHLBB/ FSLIC, itself, and administrative due process to the individual affected. This mechanism has not been followed and Pelletier's attempts to secure a prompt administrative trial has been denied. (Complaint ¶ 23).

Pelletier, alone, has been singled out for this improper treatment. (Complaint ¶ 28). As a result, Pelletier has been effectively blackballed in the industry and can not secure employment. (Complaint ¶ 24-27).

Pelletier filed this action on February 17, 1989. (Excerpt P. 39). Following rulings on Behrens' motion to dismiss, the Court below found that the following claims had been stated against Behrens. Certain of the claims, where applicable, seek punitive damages.

A. Claims One and Two insofar as they assert acts subsequent to the Behrens Directive for violations of Constitutional rights to procedural and substantive due process. These are the Bivens Claims.

B. Claim Three for injunctive relief for violation of the Administrative Procedures Act, 5 *U.S.C.* § 701-706.

C. Claim Five for interference with contract under California law.

D. Claims Six and Seven for intentional and negligent infliction of emotional distress for acts subsequent to the Behrens Directive under California law.

E. Claim Eight for negligence under California law.

ARGUMENT

Limited Jurisdiction Exists in this Court

Behrens appeal brief attempt to raise three issues for appeal to this Court. Only a part of one of the issues is properly before this Court.

The issue properly before this Court is the issue of qualified immunity. The United States Supreme Court and this Court has held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*, 472 U.S. 511, 527-530 (1985) and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach*, 881 F.2d 816, 817-818 (9th Cir. 1989).

This jurisdiction was criticized by this Court in both *City of Manhattan Beach*, supra, and *Schwartzman vs Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988). Similar criticism is applicable to this appeal which also appears to be a frivolous, knee-jerk reaction to the lower Court's order. Accordingly, Pelletier seeks his reasonable attorneys' fees and costs incurred in connection with this appeal in the sum of $10,000 pursuant to 28 *U.S.C.* § 1927.

As this Court held in *City of Manhattan Beach*, supra:

> [O]ur task is not to determine whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute. Rather the Supreme Court has said that in an interlocutory appeal from a denial of a motion for summary judgment on qualified immunity, our inquiry should be limited to deciding whether the "legal norms allegedly violated by the defendant were clearly

established at the time of the challenged actions."

Pelletier is at a loss to determine how this Court can even go about this task in the face of a total lack of record citations as required by Ninth Circuit Rule 28-2. Apparently, Behrens expects that this Court will review the entire record to determine what action was or was not taken in the Court below.

This Court is aware that Behrens filed both a motion to dismiss and a motion for summary judgment. (Excerpt P. 31). What this Court is not able to tell from the lack of record citations is the basis for seeking such relief. The motion is not referenced in the Brief of Appellant. This Court is left to guess at the arguments asserted by Behrens in the Court below, particularly since the lower Court's order does not address qualified immunity by Behrens but only the sovereign immunity claim of the USA and FHLBB. (Excerpt P. 31 et seq.).

It is also clear that the Court below did not decide the issue of qualified immunity *as a matter of law* in ruling on the motion for summary judgment. Rather, the Court below held that "[g]iven the status of discovery herein, it is premature for the court to consider defendant Behrens' motion for summary judgment. (Excerpt P. 32).

Accordingly, if there is any determination on qualified immunity in the Court below, it must be found, if at all, in the ruling on the motions to dismiss attached as part of the Excerpts.

Behrens has not cited to this Court any authority for the proposition that an interlocutory appeal may be taken from an adverse ruling on a motion to dismiss claims

based upon qualified immunity. In *Forsyth*, the Supreme Court was faced with an appeal by a defendant who had lost a motion for summary judgment, which found no qualified immunity as a matter of law. In *City of Manhattan Beach*, this Court affirmed a denial of summary judgment which required a trial of the issues.

Nevertheless, Pelletier will discuss the merits of this issue below.

Another issue sought to be raised by Behrens in this appeal is whether the Court below erred in denying his motion to substitute the USA under the Westfall Act. 28 *U.S.C.* § 2679. The first problem again faced by this Court is to find where in the record Behrens made any such motion and where in the record the lower Court denied any such motion and committed error in doing so. This is a Court of review and not a Court of first impression.

Secondly, Behrens cites this Court to no authority to support his contention that such a denial of substitution is immediately appealable. Rather, Behrens asks the Court to consider two alternatives. The first is that the motion to substitute is tantamount to a defense of qualified immunity. It is not. It should merely change the parties without otherwise effecting the relief granted. Undoubtedly, the USA would assert that if substituted for Behrens, many of Pelletier's tort claims would have to be dismissed because the USA is immune from such suits.

The second alternative suggested by Behrens is that there is some pendant jurisdiction in this Court. At a time when this Court criticizes jurisdiction over interlocutory appeals from denial of claims for qualified immunity, this Court should not expend such jurisdiction to allow the

issue to be repeatedly appealed from denials of various motions.

Nevertheless, Pelletier will discuss the merits of this issue below.

Finally, Behrens asks this Court to assume jurisdiction to decide whether the pervasive regulation of savings and loans bars Bivens claims. Again, there is no record references to this Court to support such an argument. The absence of the moving papers reference and the absence of a reference to an order of the Court below on this issue essentially requires this Court to become a Court of first impression. In any event, Congress' pervasive regulation of the thrift industry provides a mechanism for removing a thrift official which, if followed, would have avoided the Bivens claims asserted by Pelletier. 12 *U.S.C.* §§ 1730 (g),(h) and (q).

Accordingly, Pelletier respectfully requests that this Court dismiss the appeal for lack of jurisdiction and for the failure of Behrens and his counsel to support his assertions by reference to the record for the limited appellate review available. Again, Pelletier seeks his reasonable fees and costs incurred in the appeal in the sum of $10,000.

Behrens Conduct Violated Clearly Established Rights

As noted above, the standard for review of an interlocutory denial of qualified immunity is extremely narrow. Essentially, this Court must decide whether a clearly established right could have been violated by the alleged conduct. See *Forsyth* and *City of Manhattan Beach*, supra.

Pelletier submits that he had such a right in the continued employment by Pioneer and future employment in the industry.

Since this Court is being asked to make a *de novo* review of the denial of a motion to dismiss, the same rules governing the Court below should govern such a review by this Court. Motions to dismiss for failure to state a claim are disfavored. *United States vs. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) and *De La Cruz vs. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). This Court should also assume all allegations of the complaint are correct and should construe the complaint in the light most favorable to Pelletier. *Shah vs. County of Los Angeles*, 797 F.2d 743, 745 (9th Cir. 1986); *Bergquist vs. Count of Cochise*, 806 F.2d 1364, 1367 (9th Cir. 1986); *City of Redwood City*, supra at 966; and *Tormey*, supra at 48. Thus, to dismiss a complaint by motion to dismiss, it must be "beyond doubt" that Pelletier can state no facts, which would support his claims.

It is particularly important that Constitutional questions not be decided summarily. *Adickes vs. S.H. Kress & Co.*, 398 U.S.144 (1970) and *Pacific American Fisheries vs. Mullaney*, 191 F.2d 137 (9th Cir. 1951).

In *Scheuer vs. Rhodes*, 416 U.S. 232 (1974), the Supreme Court reviewed a summary judgment granted on the grounds of absolute immunity from suit of certain Ohio state officials. The case arose out of the well-publicized "Kent State" shootings in May, 1970.

A unanimous Court held that the state officials had only a claim of "qualified" immunity. The Chief Justice

went on to state as follows regarding a motion for dismissal on the grounds of qualified immunity.

> If the immunity is qualified, not absolute, the scope of the immunity will necessarily be affected by facts not established either by affidavits, admissions or a trial record.

Rhodes, supra at 243.

> Continuing, The Court stated that the plaintiffs are entitled to be heard more fully than is possible on a motion to dismiss a complaint when the defendant has only qualified immunity.

Rhodes, supra at 250.

Courts in this Circuit have followed the rule that qualified immunity involves questions of fact and is *not* a bar to suit in *Keker vs. Procunier,* 398 F.Supp. 756 (E.D. Cal. 1975).

> *Scheuer v. Rhodes, supra,* held that since the question of qualified immunity is a factual inquiry, it is not properly tested on a motion to dismiss. Accordingly, the qualified immunity envisioned by *Scheuer v. Rhodes, supra,* is appropriately raised as a defense, and is not a bar to suit.

Procunier, supra at 767. See also *Morrison vs. Jones,* 607 F.2d 1269, 1274 (9th Cir. 1979) and *Greenlaw vs. California Department of Benefit Payments,* 413 F.Supp. 420, 426 (E.D. Cal 1976)

Even were the defense of qualified immunity available to Pelletier as a private citizen (see infra), he would not be able to avail himself of it. The Behrens Directive is so flatly contrary to long-established law that no immunity can protect him for his role in issuing it.

The right to freely pursue one's profession without unreasonable governmental interference is long established under the United States and California Constitutions.

Behrens appears to argue that federal officials can without any procedural protection "blackball" someone from working in the industry of his choice and destroy an income-producing career which a person has created over thirty years.

> The law is contrary, of course. The right to hold specific *private* employment and to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. . . .

Greene vs. McElroy, 360 U.S. 474 at 492 (1959). See also *Merritt vs. Mackey,* 827 F.2d 1368, 1370 (9th Cir. 1987) and *United States vs. Briggs,* 514 F.2d 794, 798 (5th Cir. 1975).

The fundamental principal was established as long ago as 1915, in a case involving threats to employers who hired aliens. The Supreme Court established that the government can not arbitrarily threaten a person's livelihood by threats against his employer. *Truax vs. Raich,* 239 U.S. 33 (1915).

The most often cited case on Constitutional rights to employment and profession involves an engineer whose executive position in the defense industry was taken from him through the revocation of his security clearance based on Constitutionally defective hearings. (Pelletier was not given any hearings in this matter).

The Supreme Court held that the federal government can not deprive someone of his private occupation and profession by revoking such clearance based on accusations which the government prevents him from confronting. *McElroy,* supra. This decision has provided a foundation for other decisions holding unconstitutional arbitrary government action that impairs such employment.

Government action that impairs a person's ability to obtain employment by publicly labelling him as an excessive drinker is unconstitutional. *Wisconsin vs. Constantineau,* 400 U.S. 433, 435-436 (1972).

The above principals of law are thus clear and well established. Pelletier's allegations against Behrens can readily be seen to rest safely under the umbrella of Constitutional protection provided by these principles.

Application of these principles to similar facts has not been difficult. This Court had no trouble determining that it was unlawful for government evaluators to threaten a non-profit government-funded agency with cancellation of its contracts if it did not fire an employee. *Mackey,* supra. The Court held that plaintiff's interest in his employment was not changed because the employer, not the federal officials, fired the employee. A federal official who sets in motion a series of acts which he should know would cause a Constitutional injury may be held liable for a Constitutional tort. *Mackey,* supra at 1371-72.

Briggs, supra, involved a similar claim where individuals were labeled "unindicted co-conspirators" effecting their employment opportunities.

California courts, as well, have firmly protected citizens from arbitrary government threats to their employment and profession. One important case has nearly identical facts. *Endler vs. Schutzbank*, 68 Cal.2d 162 (1968).

In *Schutzbank*, the California Corporations Commissioner forced a licensee to terminate an executive and warded other licensees that he would revoke their licenses if they employed that executive. The executive had been accused of dishonesty but never given a hearing on the charges. The California Supreme court held that the *threat* was a plain violation of the executive's Constitutional rights. See also *Townsend vs. Los Angeles County*, 49 Cal.App.3d 263, 267 (1975) and *California Constitution*, Art 1, § 1.

Mr. Pelletier's right to pursue his employment and profession free from arbitrary or unreasonable governmental interference has long been established in California law. A long line of cases refutes Behrens' argument that Pelletier has no property right in his employment or profession in California law. See *California Constitution*, Art 1, § 1; *New Method Laundry Co. vs. MacCann*, 174 Cal 26, 31 (1916); *Purdy & Fitzpatrick vs. State of California*, 71 Cal.2d 566, 579 (1969); *Bautista vs. Jones*, 25 Cal.2d 746, 749 (1945); *KGB, Inc. vs. Giannoulas*, 104 Cal.App.3d 844, 849 (1980); and *County of Los Angeles*, supra.

Behrens' violations of Pelletier's clearly established statutory rights are equally patent. Under the Privacy Act, 5 *U.S.C.* § 552a(g)(1)(C) and § 552a(g)(4), it is unlawful for an agency to make a determination adverse to an individual's rights absent an adequate agency record. No record of any agency action is present in this case.

The Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g), provide specific detailed procedural requirements for the removal of a savings and loan executive by the government. These procedures and safeguards were not followed at all.

Pelletier alleges that the Behrens Directive has deprived him both of a specific job and of employment in his chosen profession, without opportunity for a hearing and without good cause. The Directive contains an actual threat of injury to Pioneer, and an implied threat of FHLBB retaliation against any thrift who hires Pelletier. The Directive presents a continuing cloud on Pelletier's professional reputation. His Fifth Amendment interests are clear.

Qualified Immunity is Not Available to Behrens

This Court has recently held that "qualified immunity is not available as a defense to private parties in a *Bivens* suit" and that "private parties are not entitled to qualified immunity for *Bivens* claims." *F.E. Trotter, Inc. vs. Watkins*, 869 F.2d. 1312, 1318 (9th Cir. 1989). This decision is controlling and resolves the only issue conceivably before the Court.

Behrens admits that he is a private party. He admits that he is a salaried employee of the Bank, which itself is not a federal agency. (Brief P. 10). Rather, the Bank is a federally chartered corporation whose stock is owned by its member associations in large part. (Brief P. 4-5). Indeed and until recently, the Bank derived income with which to pay Behrens' salary from charging its member thrifts for supervision/examination. This situation only

recently changed pursuant to the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 ("FIREA"), Pub. Law No. 101-73, 101 *Stat.* 183 at § 403 and 722. Thus, it took a recent act of Congress to transfer back to the Federal Government the supervision of thrifts which to that time had been accomplished by the member Banks.

Behrens claims that his conduct was that of an agent of the FHLBB. A similar claim was presented and rejected by this Court in *Watkins*, supra.

Additionally, the delegation of authority Behrens cites does not support his position. Nothing in the regulations or the FHLBB resolution (Excerpt P. 20) permitted Behrens to remove a thrift official from his job. That is a power held exclusively by the FHLBB/FSLIC. See the Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g).

To the extent that Behrens asserts that his conduct was permitted pursuant to 12 *U.S.C.* § 1726, such an assertion falls for two reasons. First, insurance of accounts for Pioneer had already been given for some period of time before the Behrens Directive and there is no authority for the proposition that it may be summarily revoked if the FHLBB/FSLIC happen not to like a new managing officer. Secondly, the approval process is to be accomplished by the *Principal* Supervisory Agent, Mr. Cirona, and not Mr. Behrens. (Excerpt P. 27).

Accordingly, each of the grounds used to support qualified immunity appears lacking and the orders of the Court below should be affirmed.

Federal Regulation Does Not Preempt the Bivens Claims

Assuming that this Court considers Behrens argument that comprehensive regulation bars Pelletier's Bivens claims, the argument made by Behrens is lacking in merit. Behrens is not entitled to absolute immunity and Pelletier has no Congressionally-approved alternative remedy for the deprivation of his Constitutional rights.

In *Carlson vs. Green*, 446 U.S. 14 (1980), the Supreme Court set forth *the* two considerations which a Court may use to deny a Bivens claim. The Bivens claim may be defeated by:

> "special factors counseling hesitation in the absence of affirmative action by Congress"

or by a showing that:

> Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the constitution and viewed as equally effective.

Green, supra at 18-19. See also *Schowengerdt vs. General Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987).

The "special factors" identified by the Supreme Court in the first of these two considerations are those which entitle a defendant to absolute immunity from suit because he occupies an "independent status in our constitutional scheme." *Green*, supra at 19. Absolute immunity is available to legislators, judges, and prosecutors in proper circumstances, and is plainly not available to Behrens.

The *Green* court further held that qualified immunity, where applicable, provides adequate protection from Bivens claims to those not entitled to absolute immunity.

With respect to the "alternative remedy" factor, no such remedy is found in this case. Behrens argument is circuitous. He argues that there is this factor applies to avoid the Bivens claim and he then argues that Congress has provided no remedy for his actions. Apparently, Behrens would have this Court hold that no remedy is an adequate remedy. This kind of "heads I win, tails you lose" argument does not dignify the Behrens Brief or its authors.

Behrens identifies the appropriate test for hesitation in the face of a statutory remedial scheme in *Schwiker vs. Chilicky*, ___ U.S. ___; 108 S.Ct. 2460 (1988). The test is whether Congress has provided, in the legislative design, what Congress considers an adequate redial mechanism for Constitutional violations. Behrens conceded that no such remedy can be found from his assertion that this Court ignore the removal of thrift officer statute and focus on the insurance of accounts statute.

This Court has held that when Congress has provided no remedy, a Bivens claim may go forward. *Schowengerdt*, supra.

Substitution of the USA Should Not Be Ordered

Behrens apparently seeks to have this Court as a matter of first impression substitute the USA in his place in connection with the common law torts alleged by Pelletier. This of course would not remove Behrens from

the action because he would still be a defendant in the Bivens claims and the Administrative Procedure act claim. It is rather an attempt to avoid a personal judgment against him as a private citizen and cast doubt on the ability of Pelletier for recovering on his claims for interference with contract barred against the USA by the Federal Tort Claims Act and for recovering punitive damages also barred against the government.

Pelletier has asserted above that any determination in this area by the Court below is not reviewable by this Court on an interlocutory appeal. Further, the absence of any record references for review requires this Court to guess at what was or was not done in the Court below.

Behrens relies on 28 *U.S.C.* § 2679(d), as revised by Pub. Law 100-694. This new statute has not been discussed in published opinions. This Court should insist that any certification of the Attorney-General are not improvidently and casually granted. In this case, there is no record reference before this Court that such a certificate has been made. Behrens asserts that such a certificate may be made by the Director of the Torts Branch of the Justice Department. (Brief P. 9) This person is also listed as one of Behrens' trial counsel in the Court below. (Excerpt P. 35). How can the same lawyer serve as advocate and judge at the same time?

A fair reading of the Westfall Act suggests that substitution is only proper for employees. As noted above and the orders of the Court below, there exists a factual question concerning the scope of Behrens' agency authority and Bank employment. The modification to 28 *U.S.C.* § 2679 suggest that they are applicable to employees and

only if they are acting within the scope of their authority. For the reasons set forth above, it is clear that Behrens is not an employee of the government but rather is an employee of the Bank. Further, it is equally clear that the FHLBB did not delegate to Behrens the authority to make final adjudications removing a thrift officer.

28 *U.S.C.* § 2680(h) suggests that all of the provisions of the Chapter, including § 2679, do not apply to certain claims for interference with contract. This being the case, Behrens should not be permitted to seek substitution for this claim just as he can not seek substitution on the Bivens and Administrative procedure Act claims. To construe the statute otherwise, again creates a circular argument.

California law is clear that to the extent that common law forts are alleged for willful behavior, such conduct is outside the scope of employment. See *California Civil Code* §§ 2339, 343(3); *DeMirjian vs. Ideal Heating Corp.*, 112 Cal.App.2d 251, 54 (1952) and *Ross vs. Goins*, 51 Cal.App. 412, 415 (1921). This being the case and the complaint alleging willful misconduct, substitution should not be permitted to the extent of such allegations.

Nevertheless, were this Court inclined to direct the lower court to consider substitution, it should provide the Court below with guidance as to which claims and remedies substitution is permitted and permit the Court to determine whether the factual basis for substitution exists. Pelletier submits that this is a question which most appropriately is addressed to the Court following the trial on the merits after the factual underpinnings of the

action have been determined. Behrens suffers no prejudice from this delay because he must still individually defend against the Bivens and Administrative Procedure Act claims.

CONCLUSION

Pelletier submits that this interlocutory appeal is a complete waste of this Court's time, at this juncture. The orders of the Court below are clear. The motions were at a minimum premature in the absence of discovery. Accordingly Pelletier requests that the orders be affirmed or in the alternative the appeal dismissed and Pelletier awarded his costs and fees in the sum of $10,000.

STATEMENT OF RELATED CASES

Pelletier is not aware of any related cases pending in this Court.

Dated: April 12, 1990

Respectfully submitted,

LAW OFFICES OF
SAMUEL T. REES

By /s/ Samuel T. Rees
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[Proof Of Service Omitted In Printing]

DEFENDANT/APPELLANT'S REPLY BRIEF, EOD MAY 1, 1990

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA

REPLY BRIEF FOR FEDERAL DEFENDANT BEHRENS

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TABLE OF CONTENTS

Page

I. THIS COURT HAS JURISDICTION TO HEAR ALL THREE ISSUES RAISED BY THE APPELLANT 1

II. THE PLAINTIFF'S MISTATEMENTS SHOULD NOT BLIND THE COURT TO THE TRUE NATURE OF THIS CASE 5

1. Federal Employee Status of Behrens 6

2. The Action Declining To Approve Pelletier 8

3. Questions of Statutory Authority 9

III BEHRENS IS ENTITLED TO QUALIFIED IMMUNITY 12

1. Proper citations 15

2. Appealability 15

3. Status as a Federal Employee 18

III. THE UNITED STATES SHOULD HAVE BEEN SUBSTITUTED AS DEFENDANT ON THE COMMON LAW COUNTS 20

IV. SPECIAL FACTORS PRECLUDE BIVENS RELIEF 21

CONCLUSION 24

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Creighton, 483 U.S. 635 16

Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) 20

Baker v. Racansky, 887 F.2d 183 (9th Cir. 1989) 12

Barr v. Matteo, 360 U.S. 564 (1959) 3

Carlson v. Conklin, 813 F.2d 769 (6th Cir. 1987) 3, 16

Clark v. Evans, 840 F.2d 876 (11th Cir. 1988) 16

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 5, 16

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989) 12

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 5

Demirjian v. Ideal Heating Corp., 112 Cal. App. 2d 251 (1952) 21

Endler v. Schutzbank, 68 Cal. 2d 162 (1968) 14

F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989) 7, 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16

Hewitt v. Grabicki, 794 F.2d 1373 (9th Cir. 1986) 19

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983) 18

In Re Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984) 20

Karamanos v. Egger, 882 F.2d 447 (9th Cir. 1989) 22

Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) 22

Le Bid v. Hanson, 899 F.2d 1124 (9th Cir. 1990) 2, 22

Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989) 3, 16

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987) 13

Mitchell v. Forsyth, 472 U.S. 511 (1985) 16

Neu v. Corcoran, 869 F.2d 662 (2d Cir. 1989) 16

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 3

Riverhead Savings v. National Mortgage Equity Corp., 893 F.2d 1109 (9th Cir. 1990) 5

Ross v. Goins, 51 Cal. App. 412 (1921) 21

Saratoga Savings & Loan v. Federal Home Loan Bank, 724 F. Supp. 683 (N.D. Cal. 1989) 7, 12, 20

Savings v. National Mortgage Equity Corp., No. 88-6135, decided (9th Cir. Jan. 12, 1990) 5

Schweiker v. Chilicky, 108 S. Ct. 2460 (1988) 22

Smith v. Marshall, 885 F.2d 650 (9th Cir.), petition for a writ of certiorari filed April 20, 1990 (Sup. Ct. No. 89-1646) 20

Sowell v. American Cyanamid Co., 888 F.2d 802 (11th Cir. 1989) 20

Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) 23

United States v. Hollingshead, 672 F.2d 751 (9th Cir. 1982) 19

Westfall v. Erwin, 484 U.S. 292 (1988) 3, 4

White v. Office of Personnel Management, 787 F.2d 660 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986) 13

Statutes:

Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, codified at 28 U.S.C. 2679 2

28 U.S.C. 2671 7

Privacy Act, 5, U.S.C. 552a(d) 19

12 U.S.C. 1437(a) 11

12 U.S.C. 1462(d) 19

12 U.S.C. 1464(d) 19

12 U.S.C. 1726(c) 23

12 U.S.C. 1730(g) 12

12 U.S.C. 1730(g)(1) 22

12 U.S.C. 1730(g)(2) 22

12 U.S.C. 1730(g)(5) 22

12 U.S.C. 1730(h) 12

12 U.S.C. 1730(q)(4) 22

12 U.S.C. 1730(q)(5) 22

12 U.S.C. 1831i 11

24 U.S.C. 2412(d) 23

42 U.S.C. 1983 3

REGULATIONS:

12 C.F.R. 501.10 ..... 7, 8, 12

12 C.F.R. 501.11(d) 12

12 C.F.R. 501.11(e) 10

12 C.F.R. 571.6 9

12 C.F.R. 571.6(b) 9, 10

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-56265

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR FEDERAL DEFENDANT BEHRENS

Rhetoric, like a galloping horse, has gotten out of control in plaintiff's brief. We attempt here to clarify what the case is about, why the appellant should prevail on the issues presented, and to correct plaintiff's misstatements.

I.

THIS COURT HAS JURISDICTION TO HEAR ALL THREE ISSUES RAISED BY THE APPELLANT

A. Plaintiff admits that "the issue properly before the Court is the issue of qualified immunity" (Brief at 2), but urges that this Court has no jurisdiction over the other two issues raised by this appeal – whether the plaintiff's *Bivens* action is barred by special factors, and whether the lower court erred by not substituting the United States for defendant Behrens on the common law tort claims, a procedure mandated by the recently enacted Westfall Act.[1] These assertions are not supported by any cogent and persuasive recitation of law, and are meritless.

This Court has in the past found jurisdiction in a qualified immunity appeal to rule on the "special factors" issue. In *Le Bid v. Hanson*, 899 F.2d 1124 (9th Cir. 1990), decided a short three months ago, the Court ruled on the special factors issue even though the interlocutory appeal was based on a denial of qualified immunity. The Court's action reflected sound jurisprudence. The issue at the heart of the special factors analysis is whether the plaintiff has any *Bivens* remedy whatsoever. Should this question be decided in the negative, there is no need to reach the qualified immunity issue. The two issues are obviously inextricably bound. Moreover, it simply makes no sense to rule on immunity only, leaving for a later day (in

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[1] As in our opening brief, we refer to the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, codified at 28 U.S.C. 2679, as the Westfall Act.

the event immunity is denied) the threshold question whether the plaintiff was empowered to come into court in the first place urging a *Bivens* violation.

Therefore, in unabashedly stating to this Court that there is no jurisdiction to hear the special factors argument, the plaintiff has failed to read the decisions of this Court, which reflect jurisprudentially sound reasons for hearing the special factors issue in an immunity appea1.[2]

B. There appears to be nothing but rhetoric supporting plaintiff's second attack on jurisdiction, *i.e.* his suggestion that the Court lacks jurisdiction to hear the Westfall issue. In response to our argument that the denial of substitution under Westfall is tantamount to a denial of absolute immunity, plaintiff has only this to say: "It is not." (Brief at 12). Surely three small words of denial, without citation or argument, can hardly be enough to defeat the plain meaning of an act of Congress. That act, as we explained in our opening brief, has its provenance in the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long

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[2] Other courts, in immunity appeals, have considered issues procedurally similar to the special factors question raised here. For example, in *Carlson v. Conklin*, 813 F.2d 769 (6th Cir, 1987), the Sixth Circuit held that in an interlocutory appeal from a denial of qualified immunity it could reach the issue precedent to immunity – *i.e.*, whether the plaintiff had stated an actionable claim under 42 U.S.C. 1983. As the Court observed, "[i]f the plaintiff here has failed to state a Section 1983 claim, [the] qualified immunity defense becomes moot." 813 F.2d at 771. The Sixth Circuit's reasoning applies here.

as they were acting within the scope of their employment. See, *e.g., Barr v. Matteo,* 360 U.S. 564 (1959) (plurality opinion). Denials of absolute immunity were immediately appealable. See, *e.g., Nixon v. Fitzgerald,* 457 U.S. 731 (1982); *Marx v. Government of Guam,* 866 F.2d 294, 296 (9th Cir. 1989).

In *Westfall,* the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 297-98 (emphasis in original). Congress's response was the Westfall statute which by *mandating* that there be substitution of the United States for individual defendants sued for torts committed while they acted within the scope of employment, was intended to restore an absolute immunity to these individuals. That Congress intended to give back to federal employees their absolute immunity from suit is clear – Congress specifically stated that its purpose in enacting the Westfall exclusive-remedy scheme was to render federal employees "immune from personal liability" for actions within the scope of their employment, *thereby "return[ing] [them] to the status they held prior to the Westfall decision."* 1988 USCCAN at 5947 (emphasis added). It is evident, therefore, that the defendant in this case was intended by Congress to be restored to his pre-Westfall status, *i.e.* it was intended that he be given absolute immunity. The mechanism for this is substitution – having the ultimate issues of tort law decided in a suit against the United States. Denying substitution of the United States denies the individual defendant absolute immunity. And that denial is immediately appealable.

Plaintiff has made no argument, and cited no law, to contradict this obvious fact. Moreover, although we demonstrated in our opening brief how this issue fits within the parameters of the *Cohen* collateral order doctrine[3] (opening Brief at 18-20), plaintiff has ignored this showing. We reiterate here that the lower court conclusively resolved an important issue separate from the merits (the substitution issue); and that any proceeding against Behrens on the common law tort counts will make the issue we wish to raise before this Court – whether substitution of the United States was mandatory – unreviewable. (It should be evident to even the plaintiff that by the time the case reaches this Court after final judgment Behrens will have already been subject to the burdens of discovery and trial, the burdens that an immediate appeal of immunity decisions under the *Cohen* doctrine was intended to avoid). Thus, the *Cohen* criteria have been met here, and the substitution issue is properly presented to this Court for review.

II.

THE PLAINTIFF'S MISSTATEMENTS SHOULD NOT BLIND THE COURT TO THE TRUE NATURE OF THIS CASE

A. Plaintiff contends that appellant Behrens "is neither a federal officer or even a federal employee" (Brief at 4); that he wrongfully ordered Pelletier dismissed from

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[3] See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Riverhead Savings v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990).

his job; that he acted outside the scope of his authority; and that he violated clearly established law, thus depriving him of the immunity defense. The picture plaintiff paints is not a pretty one; on the other hand, it is not an accurate one either.

To set the record straight: this case involves a defendant who was a federal employee by virtue of federal regulations and by official appointment by the Federal Home Loan Bank Board. In a letter to the plaintiff's employer, the defendant, acting in his official capacity as Supervisory Agent, stated that the Bank Board at that time could not approve plaintiff as the bank's president, because of an ongoing investigation of plaintiff's past activities. The defendant did not require that the plaintiff be fired, or that he not be employed by the bank in any top level position. Rather, the defendant wrote that "this office is unable at this time to proceed with the application until that inquiry is complete." (R.E. 28). The bank itself, which could have waited for the investigation to close, or could have hired plaintiff for a different position, chose not to wait. It was the bank (Pioneer) *not the Board or the defendant* that fired plaintiff Pelletier. With this background in mind, we turn to the erroneous statements and legal arguments of the plaintiff.

B.1. Federal Employee Status of Behrens

Plaintiff unequivocally states that Behrens was not a federal employee. This is difficult to reconcile with plaintiff's concession that "Behrens was appointed an agent of the FHLBB and FSLIC," (Brief at 6). As an agent of these two federal agencies, Behrens *was* a federal employee.

Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added). Moreover, the Federal Tort Claims Act, the statute under which the common law tort claims against the defendant would proceed if the United States is substituted as defendant, provides that an "employee of the government" includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. The definition clearly covers Behrens. While in some cases this Court has refused to accord private parties a qualified immunity defense,[4] no private party is involved here, for Behrens was incontestably an employee of the Bank Board. Although plaintiff challenges this conclusion, he never once refers to Bank Board Resolution No. 84-126, (R.E. 19) by which Behrens was appointed Supervisory Agent of the Board, or to cases supporting our construction of the regulations. See, *e.g., Saratoga Savings & Loan v. Federal Home Loan Bank*, 724 F.Supp. 683, 687 (N.D. Cal. 1989). In sum, the plaintiff has made bold but insupportable assertions and his arguments cannot be credited.[5]

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[4] See, *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989), discussed *infra* at pages 18-19.

[5] Plaintiff has asserted, without any citation, that "Behrens admits by his brief that he is neither a federal officer or even a federal employee," (Plaintiff's Brief at 4). The defendant made no such "admission." The defendant in his opening brief simply recited the factual history of his employment – that before his

2. The Action Declining To Approve Pelletier

Plaintiff claims that Behrens "caused Pelletier to be summarily fired from his position as the managing officer of a savings and loan association, and thereafter to be blackballed from further employment in the industry." (Brief at 3). This is another misstatement of fact. As we have just observed, Behrens did not mandate or coerce the firing of Pelletier. Pelletier was fired by, and in the sole discretion of, his employer Pioneer. Behrens prudently observed that the Board could not give its approval while Pelletier was under investigation for wrongdoing by the FSLIC ("We wish to advise you that an inquiry is currently being conducted by the * * * FSLIC * * * into the failure of the Beverly Hills Savings and Loan Association and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed * * *).[6] Pioneer was free to contest this withholding of approval; or to appoint Pelletier to another position; or to ask the Board for reconsideration. However, Pioneer declined to take any of these actions. It chose instead to fire Pelletier. The firing

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appointment by the Board he was an employee of the Federal Home Loan Bank of San Francisco, a quasi-governmental entity; that the Board appointed him as its Supervisory Agent; and that although he continued to be paid by the Federal Home Loan Bank Board of San Francisco, he was by law a federal employee carrying out federal functions. See, 12 C.F.R. 501.10. (See, Defendant's opening brief, at 10; 22-24).

[6] That this was prudent action is not only confirmed by common sense but by subsequent events. Pelletier was named as a defendant in a lawsuit brought by the FSLIC and charging, *inter alia*, breach of fiduciary duties and negligence. (R.E. 28)

was obviously Pioneer's doing, and cannot be attributed to Behrens. Thus, plaintiff's statement that "Behrens * * * destroyed Pelletier's career" (Brief at 3) is only hyperbole, and is not supported by the evidence.

3. Questions of Statutory Authority

a. Plaintiff states that "[a]lthough there was no statutory authority for doing so, the FSLIC purported to require that Pioneer secure approval of any new managing officer by the Principal Supervisory Agent * * * for a period of three years." (Brief at 6). Thus, plaintiff suggests that neither the FSLIC nor the Bank Board had authority to approve or disapprove Pelletier. And he goes on to urge that, in any event, it was the Principal Supervisory Agent who should have made the decision on Pelletier, not Supervisory Agent Behrens.

Plaintiff is simply wrong. As plaintiff should be aware, when new banking institutions apply to the FSLIC for insurance of their accounts, the Supervisory Agent is required to closely scrutinize the new entity's *bona fides*. See generally, 12 C.F.R. 571.6. Acting on behalf of the FSLIC, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* This duty continues, even after a bank has been chartered.[7]

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[7] As already noted, the Supervisory Agent "is required to reject an applicant if it finds that the capital of the applicant is

The FSLIC must not only closely scrutinize the new entity applying for insurance, but may in its discretion condition approval of insurance on continuing approval, for a period of years, of the applicant bank's policies and appointments. See n. 7, *infra*. Such was the case here. Pioneer's predecessor in interest, South Coast Savings & Loan Association, had received Board approval for insurance of its accounts. However, one of the conditions of this approval, as specified by Bank Board Resolution 84-164, was that the institution –

> shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent * * * . In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following, * * * the continuation or succession of competent management will also be subject to the

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impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable." *Id.* This obligation to oversee savings and loans continues even after a bank charter is approved:

> After issuance by the Board of a charter for a Federal savings and loan association, said agent shall follow up the corporate actions taken by the association in the completion of its organization, and require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. [12 C.F.R. 501.11(e).]

Principal Supervisory Agent's approval. [R.E. 27]

Plaintiff fails to even acknowledge Bank Board Resolution 84-164. Indeed, he never once cites the Resolution in his brief. Yet the document is crucial to an understanding of both the history of the case, and the nature of the Bank Board's oversight of Pioneer.

It is obvious that Pioneer was required by this Resolution to obtain approval of its new president-designate. Pioneer, indeed, recognized this obligation: why else would it have submitted Pelletier's name to the agency for approval. Therefore, the plaintiff is dead wrong in asserting that there was no authority for requiring Pioneer to submit the names of its officers for Board approval.[8]

b. Similarly, there is no merit to plaintiff's contention that, if approval from the agency was necessary, the approval or disapproval should have come from Principal Supervisory Agent James Cirona, not by Supervisory Agent Behrens. (Brief at 7-8). Behrens had the delegated authority of the Principal Supervisory Agent, and his

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[8] Section 914 of the new FIRREA statute expressly requires agency approval of directors and senior executive officers. Under this statutory provision, "[a]n insured depository institution or * * * holding company may not add any individual to the board of directors or employ any individual as a senior executive officer if the appropriate Federal banking agency issues a notice of disapproval * * * ." This applies to institutions chartered less than two years; institutions that have undergone changes in control within the preceding two years; and institutions not in compliance with certain minimum capital requirements. See, 12 U.S.C. 1831i.

consideration of the Pelletier appointment was thus entirely lawful and proper. See, 12 U.S.C. 1437(a) ("the Board may from time to time make such provision as it deems appropriate authorizing the performance by any officer, employee, agent, or administrative unit thereof of any function of the Board * * * * "); 12 C.F.R. 501.10; 501.11(d). See also, *Saratoga Savings & Loan, supra,* 724 F. Supp. at 684-5.

c. Finally, we note that there is also no merit to plaintiff's assertion that if Pelletier was to be "removed," the action should have been taken pursuant to statute. To support this argument plaintiff cites to 12 U.S.C. 1730(g) and(h), statutory provisions which govern removal of previously approved officers. This case, however, does not concern removal of a *previously approved* officer. This is a case about *approval* of an officer. No one disputes that, had Pelletier been approved, any subsequent removal from what would have then been a permanent position with vested rights would trigger the statutory remedies plaintiff refers to. This case only involves the threshold step of approval; therefore, Behrens acted lawfully, and with full authority. The plaintiff errs in asserting otherwise.

III

BEHRENS IS ENTITLED TO QUALIFIED IMMUNITY

A. It is the plaintiff's burden to demonstrate to the Court that the rights allegedly violated were clearly established. See, *Baker v. Racansky,* 887 F.2d 183 (9th Cir. 1989). Given this burden, we find it remarkable that plaintiff has not addressed the most relevant federal

court of appeals decision dealing with the immunity issue, the Fifth Circuit's decision in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989). In *Connelly*, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established property right in employment where the employment was "contingent upon regulatory approval." Accord: *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 479 U.S. 885 (1986). Since Pelletier had at best a unilateral expectation of employment, and the case law supports the view that in such circumstances no due process property rights are violated when contingent approval is not forthcoming, Behrens – given the facts known to him which he believed to be true – acted reasonably and is thus entitled to immunity.[9]

B. Plaintiff claims that "the Behrens Directive is so flatly contrary to long-established law that no immunity can protect him." (Brief at 16). Plaintiff then goes off on a

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[9] None of the cases cited by the plaintiff, some of them quite ancient, support his assertion that due process was not accorded him. The only case he cites which is at all relevant, although not on point, is this Circuit's holding in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987). However, as we noted in our opening brief, the Court in *Mackey* found that the plaintiff had a legitimate claim to his job based on state law, and that the federal agency had actually ordered termination of plaintiff's employment. *Mackey*, therefore, is a much different case than this one, since here plaintiff had only a unilateral expectation of employment, and he was not ordered terminated by the Bank Board.

long excursion, explaining why Behrens could not "blackball" Pelletier, *i.e.* because under both federal and state law Pelletier had the right to pursue his employment free from unreasonable governmental interference.

The plaintiff fails, however, to squarely face the facts of this case. It is obvious from the Behrens letter that the defendant only declined to approve Pelletier as president "at this time." This is not the same thing as ordering the man fired. It was Pioneer that ordered Pelletier fired, choosing to do this rather than await the outcome of the FSLIC investigation; rather than appointing Pelletier to another position; and rather than challenging the Board decision. In sum, Behrens neither fired Pelletier, ordered him fired, or "blackballed" him. Therefore, none of Pelletier's citations, which deal with cases where a state agent ordered a termination of employment, (*e.g., Endler v. Schutzbank,* 68 Cal. 2d 162 (1968)) are relevant.

C. Plaintiff's other attacks on our immunity argument are equally insubstantial. First, he is "at a loss to determine how this Court can even go about the task of [deciding this issue] in the face of a total lack of record citations * * * ." (Brief at 11). Second, he contends that an interlocutory appeal of a denial of immunity can only be taken where the appeal is from a denial of summary judgment, not where the appeal lies from the denial of a motion to dismiss. Third, he asserts that the Court cannot reach the issue because "the Court below did not decide the issue of qualified immunity *as a matter of law* in ruling on the motion for summary judgment" (Brief at 11). And fourth, he urges that Behrens was not a federal employee but a private person, who cannot claim immunity. Our answers to these claims are as follows.

1. Proper citations.

The opening brief of the defendant contains the required citations to the record. These appear in both the factual statement and the argument. They include references to where in the record the district court addressed the issues raised. (See, *e.g.* Defendant's Opening Brief at 10-14, particularly at 13 ("The District Court Orders")). Even without such citations, the Court would not be "at a loss" to decide the immunity issue since the issue is reviewed *de novo* and the key documents (*i.e.* the district court orders, the Resolution appointing Behrens, the Resolution requiring continuing approval of Pioneer's officers, and the letter Behrens wrote to Pioneer) are all contained in the Excerpts of Record. It is evident from these documents that Behrens acted within the scope of his employment and could not have reasonably believed he was violating clearly established law.[10]

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[10] The theme of failing to properly cite to the record runs throughout plaintiff's brief. The fact is that the defendant's opening brief contains numerous citations to the record, as required by the Court's rules. Pages 12-15 of our opening brief explains the nature of the present litigation and the nature of the district court orders, and properly cites to the record. Contrary to plaintiff's urging, therefore, the Court should not "be at a loss to determine" what the lower court did and what issues are presented on appeal.

This makes it even more preposterous that plaintiff has asked that the Court subject defendant to "sanctions" for failure to include citations to the record. (Brief at 1).

2. Appealability

a. Plaintiff's contention that only denials of summary judgment on immunity grounds are appealable (hence not denials of motions to dismiss based on immunity) is nonsense. The Supreme Court has held that qualified immunity questions should be resolved at the earliest possible stage of litigation. See *Anderson v. Creighton*, 483 U.S. 635; *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Courts following this instruction regularly take appeals from denials of qualified immunity defenses raised in motions to dismiss. See, *e.g.*, *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) (denial of motion to dismiss based on immunity falls within the Cohen collateral order doctrine); *Neu v. Corcoran*, 869 F.2d 662 (2d Cir. 1989); *Clark v. Evans*, 840 F.2d 876 (11th Cir. 1988); *Carlson v. Conklin*, 813 F.2d 769 (6th Cir. 1987).

It is particularly important in cases like this one to hear appeals from denials of immunity as soon as possible. The *Bivens* cause of action is often abused by litigants who quarrel with governmental action. Plaintiffs often sue the federal official in his official capacity and his personal capacity, even where, as here, it is clear that the official was simply performing his lawful duties. Since no employee in the private sector has the potential liability of a federal employee, the qualified immunity defense was intended to be proffered as early as possible in the litigation and, if rejected, to be appealed immediately. This means an appeal from a denial of a motion to dismiss is as valid as an appeal from a denial of summary judgment.

b. Plaintiff's additional claim that the court below did not reject qualified immunity as a matter of law, and that therefore the issue may not be appealed, is also fallacious. The court below squarely denied the defendant's legal claim to qualified immunity. The immunity argument was made in full in Defendant's Motion to Dismiss, dated May 16, 1989, at pages 2326. The district court granted the motion to dismiss in part, and denied it in part, stating as follows:

> The motions to dismiss of defendants Behrens and FHLB-SF are granted to the extent such claims are based on the Behrens Directive and/or plaintiff's loss of employment with Pioneer Savings and Loan, as barred by the one-year statute of limitations, and are denied to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment * * * . [R.E. 32-33].

The court plainly refused to dismiss Behrens from this lawsuit on immunity grounds. This judgment is reviewable in this Court on appeal.

We note that appeal of the immunity issue is particularly important here for several reasons: First, the case's procedural history reveals that the district court denied the immunity claim *without explanation*, and ruled *without holding a hearing on the issues presented*. The court's failure to explain its actions is particularly troubling; the court had already ruled that because of the one year California statute of limitations applicable to *Bivens* claims, the plaintiff's *Bivens* cause of action, to which defendant had proffered his immunity defense, could *not* be based upon

either the Behrens letter to Pioneer, or the subsequent firing of Pelletier by Pioneer. Since in the lower court's view the two actions upon which plaintiff based his claim for relief could not be the basis of a *Bivens* lawsuit, and since no other specific allegations of wrongdoing have been alleged, the district court's denial of the immunity defense makes little sense. It would undermine the purposes of the immunity doctrine if this decision – made without explanation or a hearing – could not be reviewed quickly by an interlocutory appeal.

3. Status as a Federal Employee

Plaintiff's contention that Behrens was not a federal employee but a private person, and thus not entitled to immunity, has already been addressed in our opening brief at pages 22-24; 42-44, and in this brief, *supra*, at pages 6-7. This is not a case like *F.E. Trotter, Inc.* in which this Court refused to accord private parties a qualified immunity defense. *Trotter* involved a private engineering firm's study of the lands surrounding a naval air station in Hawaii. The landowners claimed that the study and the actions it recommended "impacted and blighted" their property. 869 F.2d at 1313. Observing that the Supreme Court has not decided whether to accord private defendants immunity in 1983 and *Bivens* suits, the Court extended its earlier statement, in *Howerton v. Gabica*, 708 F.2d 380, 385 n. 10 (9th Cir. 1983), that private defendants in 1983 suits are not eligible for qualified immunity. Behrens, of course, was not a government contractor performing an assigned task, but a duly appointed Supervisory Agent of the Bank Board. As we have already

emphasized, he was carrying out federal functions pursuant to federal regulations and statutes. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He thus may claim, and in our view should be granted, qualified immunity from suit. See, *United States v. Hollingshead*, 672 F.2d 751, 754 (9th Cir. 1982) (employees of the Federal Reserve Banks are public officials for purposes of the federal bribery statutes; "the test for determining status as a public official turns on whether there is 'substantial federal involvement' in the defendant's activities.").[11]

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[11] Plaintiff asserts (Brief at 19) that Behrens violated his clearly established rights because under the Privacy Act the Board should have made an "adequate agency record"; and because provisions of the Home Owners Loan Act of 1933 were not followed.

However, the district court dismissed the Privacy Act claim as to Behrens (R.E. 33), and that dismissal is not before this Court. In any event, the Privacy Act, which requires federal agencies to permit individuals access to their records and to seek amendment of inaccurate records (5 U.S.C. 552a(d)) is not relevant here. Even if it were relevant, the act would not give plaintiff a private right to sue an individual official for violations of its provisions. See, *Hewitt v. Grabicki*, 794 F.2d 1373, 1377 & n.2 (9th Cir. 1986).

Reliance on the Home Owners Loan Act is also misplaced. 12 U.S.C. 1464(d), upon which plaintiff relies, does not apply to this case. The section establishes a procedure by which the Bank Board may remove a director or officer of an "association." The definition of "association" excludes state-chartered institutions, like Pioneer. 12 U.S.C. 1462(d). Nothing in the statute, in any event, provides a private right of action for damages.

III.

THE UNITED STATES SHOULD HAVE BEEN SUBSTITUTED AS DEFENDANT ON THE COMMON LAW COUNTS

A. One of plaintiff's most difficult to digest claims is that the Court should not substitute the United States as defendant because the statute under which substitution of the United States would occur (the Westfall Act) "has not been discussed in published opinions." (Brief at 24). Not only has plaintiff missed the numerous published decisions construing this statute, he apparently has not read our brief, which cites them. (See Defendant's Opening Brief at 16, 29 n. 12). See, *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989); *Sowell v. American Cyanamid Co.*, 888 F.2d 802 (11th Cir. 1989); *Saratoga Savings & Loan v. Federal Home Loan Bank, supra*, 724 F. Supp. at 684-5. See also, *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), petition for a writ of certiorari filed April 20, 1990 (Sup. Ct. No. 89-1646).

The fact is that substitution of the United States under the terms of the Westfall statute is regularly granted by the federal courts. It must occur whenever a federal employee is sued in his or her individual capacity for common law torts committed in the scope of employment.

B. We devoted pages 24-26 of our opening brief to establishing that Behrens was acting within the scope of his employment. Plaintiff has not addressed the cases we cited, (*e.g., In Re Complaint of McLinn*, 744 F.2d 677 (9th Cir. 1984)), but has cited two cases of his own, and a section of the California Civil Code, in support of the

proposition that "California law is clear that to the extent common law torts are alleged for willful behavior, such conduct is outside the scope of employment." (Brief at 25). Neither the two cases plaintiff cites nor the California Civil Code supports this statement. In *Demirjian v. Ideal Heating Corp.*, 112 Cal. App. 2d 251 (1952), the court simply held an employer is not responsible for an employee's acts "which have no connection with the duty of employment." 112 Cal. App. 2d at 254. In *Ross v. Goins*, 51 Cal App. 412 (1921), the court found that as a matter of proper pleading a complaint charging an employer with liability for an employee's assault must also aver that the principal authorized the act. The California Civil Code provides that an agent is acting within scope so long as the wrongful acts committed occur while transacting the master's business, or was incident to his duties as employee. See California Civil Code, Section 2338, and case annotations. Since Behrens, when disapproving plaintiff as bank president, was clearly transacting his master's business (*i.e.*, the business of the Bank Board), even plaintiff's citations support our assertion that Behrens was acting within the scope of his employment.

IV.

SPECIAL FACTORS PRECLUDE BIVENS RELIEF

The plaintiff states that special factors will preclude creation of a *Bivens* remedy only when "Congress has provided, in the legislative design, what Congress considers an adequate redial [sic] mechanism for Constitutional violations." (Brief at 23). This is an incorrect statement of the test. As this Court and the Supreme

Court have ruled, special factors will preclude creation of *Bivens* remedies when Congress has comprehensively constructed an elaborate remedial system with careful attention to conflicting policy considerations, and has not inadvertently failed to provide the relief the plaintiff seeks. See, *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988); *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), *Karamanos v. Egger*, 882 F.2d 447 (9th Cir. 1989), and *Le Bid v. Hanson*, *supra*.

In this case, Congress has comprehensively regulated the thrift industry, and has not inadvertently left out a remedy for money damages in favor of individuals not approved for positions by the Bank Board. When the FSLIC believes that an officer or director of an insured institution, someone already approved, appointed, and vested in his or her position, has evidenced personal dishonesty, violated any law, rule, regulation, or final cease-and desist order, participated in any unsafe or unsound banking practice, or breached his fiduciary duty to the institution, the FSLIC may order an immediate suspension of that person from office and institute proceedings to remove him permanently from the thrift industry. 12 U.S.C. § 1730(g)(1) and (2). In such circumstances, Congress has laid out a careful and comprehensive statutory scheme prescribing varying levels of review for each of the FSLIC actions just described. See, 12 U.S.C. § 1730(q)(4) and (5); *Id.* § 1730(g)(5).

However, in the instant case, the statutory provision that authorized defendant Behrens' actions is 12 U.S.C. § 1726(c), which governs *applications* for FSLIC insurance. While in Section 1726(c) Congress expressly directed the FSLIC to "reject the application of any applicant [for

FSLIC insurance] if it finds that * * * [the applicant's] financial policies or management are unsafe * * * [or] that the character of management of the applicant * * * is inconsistent with economical home financing or with the purposes of this subchapter," Congress did not provide to the individual affected any administrative or judicial review of the FSLIC's decisions under Section 1726(c). Congress' choice reflects a careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. The Court, therefore, should hesitate to create a *Bivens* remedy in favor of the plaintiff.

This does not mean that the plaintiff would have been entirely without a remedy for any alleged constitutional violations. At least in the D.C. Circuit, he could have brought an action against the agency (or against Behrens in his *official* capacity) seeking equitable relief, even though *Bivens* relief is foreclosed by special factors. See, *Spagnola v. Mathis*, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (*en banc*).[12]

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[12] Plaintiff's claim that he should be awarded attorney's fees for this appeal fails to note that, even assuming *arguendo* that such fees are available in a *Bivens* suit, no EAJA fees could be awarded in this case because the position of defendant Behrens is substantially justified. See 24 U.S.C. 2412(d).

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully Submitted,

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COURT OF APPEALS' ORDER REQUESTING SUPPLEMENTAL BRIEFS, EOD JANUARY 6, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Jan. 6, 1992)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior U.S. District Court Judge*

Pursuant to our order of limited remand entered May 2, 1991, the district court has considered appellant Behrens' request for substitution of the United States as defendant, in his place, under the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA), and has issued a ruling denying that request. Accordingly, we now reinstate Behrens' appeal.

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* Senior United States District Judge, District of Hawaii, sitting by designation.

The parties are hereby requested to brief the issues of whether denial of a motion to dismiss based on a qualified immunity claim is immediately appealable in this circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and whether denial of a request for substitution of the United States as a defendant under the FELRTCA is likewise immediately appealable. The government shall have 21 days from the date of this order in which to file its opening brief. Appellee Pelletier shall file his response within 14 days thereafter, with the government's reply brief, if any, to be filed within 10 days of the response. The opening briefs shall not exceed 20 pages and the reply shall not exceed 10 pages.

DEFENDANT/APPELLANT'S MOTION TO STAY, EOD JANUARY 24, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER Plaintiff-Appellee v. FEDERAL HOME LOAN BANK BOARD Defendants, and JOHN W. BEHRENS Defendant-Appellant.	)	No. 89-56265

MOTION OF THE APPELLANT FOR A STAY OF DISTRICT COURT TRIAL PROCEEDINGS UNTIL THIS COURT ISSUES A RULING ON THE IMMUNITY ISSUES IN THIS APPEAL

Pursuant to Rules 8 and 27, Federal Rules of Appellate Procedure, and Rule 27 of this Court, the appellant, John W. Behrens, by his counsel at the Department of Justice, respectfully requests a stay of all trial proceedings in the district court pending this Court's resolution of this appeal. A stay pending appeal was sought from the district court on November 10, 1991. The stay was denied on January 17, 1992.[1]

[1] All relevant orders are attached to this motion.

This case has already been briefed and argued before a panel of the Court. After issuing an order requiring a limited remand, the appeal was reinstated by order of the Ninth Circuit, dated January 6, 1992. The appeal raises two significant and dispositive legal issues: whether the defendant is entitled to qualified immunity from suit on the allegations of constitutional wrongs asserted against him; and whether he is entitled to the absolute immunity from suit provided by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Reform Act"). Under the Reform Act, a federal defendant sued for common law torts in his personal capacity is granted absolute immunity, by the mechanism of substitution of the United States as defendant. Substitution is required by the Reform Act when the individual defendant was acting within the scope of his employment.

Although this Court has time and again held that the purpose of deciding official immunity questions at the earliest possible time is *to avoid trial*, the district court has set a trial date of April 21, 1992 and a pre-trial date of March 2, 1992; to satisfy Local Rules No. 9, pre-trial meetings will commence on January 30, 1992. These imminent dates for pre-trial and trial erode the purposes of the immunity defense, and will irrevocably harm the defendant. This Court has held that "[t]he entitlement is an immunity from suit rather than a mere defense to liability; *it is effectively lost if a case is erroneously permitted to go to trial. Compania Mexicana De Aviacion v. U.S. District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). See, *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991).

Proceeding to trial, without awaiting the outcome of this appeal, will cause unnecessary work and confusion at the trial level. The district court ruled that for purposes of Reform Act substitution, the defendant was *not* acting within the scope of his employment at the time the acts complained of took place. However, if the lower court is correct on this point, then by setting for trial plaintiff's Federal Tort Claims Act, APA, Privacy Act, and common law tort claims against the United States the court has erred; for these claims against the United States logically fail if the defendant was not acting within the scope of his employment. Plainly, the United States cannot be liable for damages if its employee was acting outside the scope of his employment when committing the acts charged as wrongful. Much of the case, in other words, now turns on a review of the district court's ruling on the Reform Act substitution issue, an issue squarely presented in the appeal before this Court.

In sum, logic, as well as the law of official immunity, counsels strongly against proceeding with a trial at this juncture. There is no harm to the plaintiff in waiting; on the other hand, if a trial takes place the defendant loses his right not to stand trial until the immunity issue has been resolved, a right that cannot be restored to him after trial.

STATEMENT

A. Factual Background

1. The defendant, John W. Behrens was, at the time of the events giving rise to this lawsuit, an employee of the Federal Home Loan Bank of San Francisco, a privately

owned institution. On March 17, 1984, the Federal Home Loan Bank Board (now part of the Office of Thrift Supervision) adopted Formal Resolution 84-126, designating Behrens a Supervisory Agent, hence an agent of the Board and of the FSLIC. Behrens continued to be paid by the Federal Home Loan Bank of San Francisco, but instantly became responsible for supervising federally insured savings and loan institutions in the San Francisco district to insure compliance with law.

2. The plaintiff, Robert J. Pelletier, was the president designate of Pioneer Savings & Loan Association. Because Pioneer was a so-called "de novo" savings and loan (an institution in operation less than three years at the time it applied for FSLIC insurance, see 12 C.F.R. 571.6(b)), Pioneer was required to obtain approval of its new president-designate from Supervisory Agent Behrens.

This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank, problems so serious that Agent Behrens on behalf of the Bank Board sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter

was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. The Initial District Court Proceedings

This lawsuit was brought by Pelletier to avenge his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and substantive due process rights. Other counts were founded upon the APA, the Privacy Act and common law tort theories, the latter including interference with contract rights, intentional infliction of emotional distress and negligence.

The Department of Justice filed a motion seeking substitution of the United States for Behrens, insofar as common law torts were alleged, a requirement of the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988; seeking the dismissal of all other claims; and seeking a grant of qualified immunity for Behrens.

The district court granted the motion in part. The court dismissed the APA and Privacy Act damage claims against Behrens, and held that the one year state statute of limitations on *Bivens* claims barred a *Bivens* claim based on the Behrens letter to Pioneer or the act of

dismissal itself. The court also held that California's one year statute of limitations barred certain acts alleged to be common law torts. However, the court made the following additional rulings:

1. The court declined to dismiss the *Bivens* claim, to the extent it rested on acts that were not time-barred – even though no specific acts were alleged;

2. The court appeared to deny substitution of the United States as defendant on the remaining common law tort counts;

3. The court denied Behrens' motion for summary judgment on qualified immunity grounds, stating that granting the motion would be premature;

4. The court vacated an earlier protective order, reasoning that whether Behrens acted outside the scope of his authority could be known only after discovery was complete.

C. The First Appeal To the Ninth Circuit

1. Behrens appealed three issues to this Court: (1) whether, to the extent the complaint alleged the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988; (2) whether the special factor of Congress' comprehensive regulation of the thrift industry barred plaintiff's *Bivens* action; (3) whether Behren's motion for qualified immunity should have been granted by the district court. Behrens sought a stay of discovery pending appeal. However, the stay

pending appeal was summarily denied by the Court, without comment.

2. The appeal was duly briefed and it was argued before a panel of the Court on April 4, 1991. During the course of the oral argument, the panel indicated that it was unclear whether the district court had formally ruled on the Reform Act substitution issue.

On May 2, 1991, the Court remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling." If no ruling had been made, the district court was instructed to rule on the issue.

On July 24, 1991, the Ninth Circuit ordered that submission of the appeal be vacated "pending order of the Court."

D. Subsequent Actions By The District Court

On July 29, 1991, the district court entered an order stating that it had not ruled on the substitution issue, and requiring further briefing of that issue.

Thereafter, on October 8, 1991, the district court issued a second order, one that addressed the substitution issue, *i.e.*, the subject of the Ninth Circuit's limited remand. The lower court held that the federal defendant was not acting with the scope of his employment at the time the alleged acts occurred, and that therefore, there could be no substitution of the United States as defendant under the Reform Act.

The district court has set a trial date of April 21, 1992 for plaintiff's FTCA, APA, Privacy Act, and other claims against the United States and its agencies (*i.e.*, the Office of Thrift Supervision and the Federal Deposit Insurance Corporation which was joined as a defendant); also scheduled for trial on this date are the *Bivens* and common law tort claims lodged against Behrens. Pre-trial is set for March 2, 1992. To satisfy local rules, pretrial meetings will commence on January 30, 1992.

On November 10, 1991, the Justice Department filed a motion in district court to stay all trial proceedings pending ultimate disposition of the case by the Ninth Circuit. The motion for a stay was denied by the district court on January 17, 1992.

E. Recent Actions In the Ninth Circuit

On November 1, 1991, after the lower court's ruling on substitution, the Justice Department filed a motion with the Ninth Circuit seeking to have the appeal reinstated, and seeking permission to file supplemental briefs on the scope of employment issue – or any other issue the court was interested in.

Thereafter, on January 6, 1992, the Ninth Circuit issued an order reinstating the appeal. The court also ordered the filing of supplemental' briefs on two issues: whether denial of a motion to dismiss based on qualified immunity "is immediately appealable in this circuit" and whether denial of a motion to substitute is immediately appealable. We are at present preparing our supplemental brief.

ARGUMENT

This case easily satisfies the requirements for a stay of all trial proceedings – a showing of irreparable harm absent a stay; a likelihood of success on the merits; and lack of any harm to the non-moving party by issuance of a stay.[2] A stay pending resolution of this appeal would be to the benefit of all parties, for this Court's ruling on appeal will necessarily clarify the causes of action that plaintiff may have, and the parties against whom those causes of action may be asserted. At the same time, a stay will prevent the defendant from forfeiting his right not to stand trial until the immunity issue has been decided – a right recognized by this Court as well as the Supreme Court of the United States as one that is lost – to the irreparable harm of the defendant – if the case proceeds to trial before the immunity issues are resolved. We address the elements for a stay below.

A. Irreparable Harm

1. The law of official immunity law is well-established. A federal defendant is entitled to have his or her claim of immunity decided at the earliest possible time prior to trial, and if the claim is denied, the defendant is entitled to take an interlocutory appeal to a federal appellate court on the issue. Such early adjudication of immunity claims is permitted because "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long

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[2] See, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Briggs v. Sullivan*, 886 F.2d 1132 (9th Cir. 1989).

drawn out lawsuit," *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). The immunity defense is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question [of immunity]." *Mitchell v. Forsyth*, 472 U.S. at 526.

This Court has repeatedly recognized that immunity issues are to be decided before final judgment, so that the defendant does not have "to answer for his or her conduct in a civil damages action. See, *Di Martini v. Ferrin*, 889 F.2d 922, 925 (9th Cir. 1989), *amended*, 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2796 (1991) ("[d]enying the official interlocutory review denies him or her the right to avoid trial." Moreover, the Court has recognized that if a defendant is forced to go to trial before the immunity issue is resolved, he or she suffers irreparable harm. Thus the Court in *Compania Mexicana De Aviacion v. U.S. District Court*, held that "[t]he entitlement is an immunity from suit rather than a mere defense to liability; *it is effectively lost if a case is erroneously permitted to go to trial*". 859 F.2d at 1358 (emphasis added).

2. At issue here, then, is an entitlement not to stand trial, one that will be lost if trial is allowed to proceed. Permitting the trial to go ahead, as planned, on April 21, 1992, and indeed permitting the pre-trial to commence (pre-trial that necessarily entangles the defendant in the burdens of trial)[3] inflicts an irreparable injury on the

---

[3] In *Siegert v. Gilley*, 111 S.Ct. 1789 (1991) the Supreme Court observed that "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant * * * unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."

defendant, and violates the law of this Circuit and the Supreme Court.

To avoid irreparable harm to a defendant appealing the denial of official immunity, several courts have held that filing a notice of appeal from the denial of a pre-trial motion based on official immunity divests the lower of court of jurisdiction to go to trial. The United States Court of Appeals for the Seventh Circuit held in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) that –

> The justification for the interlocutory appeal is that the trial destroys rights created by immunity * * * . It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . [A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial. [870 F.2d at 1338]

The United States Court of Appeals for the Tenth Circuit issued a similar ruling in *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990):

> In contrast to some interlocutory appeals under 28 U.S.C. 1292(b) that challenge discrete orders that can be carved out and isolated from the remainder of the case, a motion to dismiss the entire proceeding based on a defense of double jeopardy or qualified immunity cannot be so isolated. If the defense is valid, then no part of the action should proceed against the defendant. [In such circumstance, a notice of appeal] divests the district court of jurisdiction to proceed with any part of the action

> against an appealing defendant. [915 F.2d at 576]

This Court, we submit, should grant a stay of trial proceedings for the very reasons that motivated the Tenth and Seventh Circuits to issue the decisions in *Apostol* and *Donges*: permitting a trial to proceed while the immunity issues remain on appeal simply makes no sense and works too great a harm on the defendant who has gone to the court of appeals with his good faith claim of immunity. As the Seventh Circuit observed in *Apostol* "[i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one * * * . See, 870 F.2d at 1338.

3. Moreover, in this case there are additional reasons for granting a stay. Allowing a trial to proceed, after the district court's ruling that the defendant was acting outside the scope of his employment, will almost certainly confound the trial proceedings, making them more rather than less complicated. The district court has ruled that for purposes of Reform Act substitution, the defendant was *not* acting within the scope of his employment at the time the acts complained of took place. However, if the lower court is correct on this point, then it has erred by setting for trial plaintiff's Federal Tort Claims Act, APA, Privacy Act, and common law tort claims against the United States. These claims against the sovereign logically fail if the defendant was not acting within the scope of his employment, for the United States cannot be liable for damages if its's employee was acting outside the scope of his employment when committing the acts charged as wrongful. Much of the case, in other words, presently turns on a review of the district court's ruling on the Reform Act substitution issue, an issue squarely presented in the

appeal before this Court. An orderly process of adjudication suggests that the dispositive issues be handled on appeal before the trial proceeds go forward.

A stay, therefore, will clarify the issues to be resolved at trial and the parties against whom various causes of action may be asserted.

B. Likelihood of success on the Merits

1. The defendants have a strong likelihood of success on the merits of their appeal.[4]

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[4] As a threshold matter, it is clear that the lower court orders on qualified immunity and Reform Act substitution are appealable. This Court has often held that appeals of immunity issues may be maintained from a lower court's denial of immunity at the motion to dismiss stage. See, *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Compania Mexicana De Aviacion v. U.S. District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988). The Supreme Court has authorized interlocutory appeals from denials of both absolute and qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In addition, the Supreme Court has held that denials of substitution under the Reform Act are denials of absolute immunity: "[t]he Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in Westfall." *United States v. Smith*, 111 S.Ct. 1180, 1183 (1991). See, also, *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (where district court remand order effectively denies employee Reform Act immunity, the order is appealable); *Nasuti v. Scannell*, 906 F.2d 802 (11th Cir. 1990) (district court order declining to rule on scope and remanding to state court is appealable); *Yalkut v. Gemignani*, 873 F.2d 31 (2d Cir. 1989) (denial of substitution is an appealable order).

The act upon which the legal theories of plaintiff's complaint principally rest – Behrens' letter declining to approve or disapprove Pelletier as president until the FSLIC investigation was concluded – was found by the district court to be time-barred. This leaves only generalized complaints that Behrens and the other defendants somehow "conspired" to deny Pelletier employment in the financial industry. However, as this Court has repeatedly held, a plaintiff is not entitled to survive "on vague assumptions [about the loss of employment opportunities]" not supported by specific allegations in his complaint. *Di Martini v. Ferrin*, 889 F.2d at 926-27. See also, *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Clearly, plaintiff should not be able to preclude a ruling on immunity, or on the common law tort issues, by relying on liberal notions of pleading; the defendant has given a detailed explanation of his actions and plaintiff cannot simply rest upon the bare allegations of his complaint. See, *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

2. Moreover, even if the specific allegations of the complaint were not time-barred, the district court should have granted Behrens immunity on the *Bivens* count, and should have substituted the United States on the common law tort counts.

(1). Qualified Immunity

The plaintiff's principal complaint is that because he was being investigated by the FSLIC for wrongdoing during his tenure at another bank, Behrens was "unable to proceed" with the application seeking approval of Pelletier as president of Pioneer. Pelletier attempts to

make out of this action by Behrens a constitutional violation. However, there was nothing remotely illegal about Behrens, action. Pelletier was the subject of an FSLIC investigation which found wrongdoing at the Beverly Hills Savings & Loan Association, where Pelletier had been a senior loan officer. Had Behrens, acting on behalf of the agency, not declined to approve or disapprove Pelletier, he might later have been charged with not carrying out the mandates of his office.[5] All Behrens did was to decline approval of Pelletier "at this time," and until "the investigation into the failure of Beverly Hills Saving is complete." It was, after all, Pelletier's employer, Pioneer, that made the decision to terminate him. The decision to terminate was *not* made by Behrens.

To deny immunity, the district court would have had to find that Behrens, in taking this action, reasonably should have known he was violating a clearly established right. As we have just observed, Behrens was only being true to the requirements of his job. He could not have reasonably believed he was violating clearly established law.

The Fifth Circuit's holding in *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989), supports this conclusion. In a factual situation remarkably similar to

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[5] Indeed, the FSLIC subsequently sued Pelletier and other former officers and directors of Beverly Hills for alleged breach of fiduciary duty, negligence, waste and diversion of corporate assets. The defendants in that case, Pelletier included, have finalized a settlement agreement expected to result in the payment to FSLIC of more than $8 million.

the one here, an applicant for the presidency of a proposed national bank claimed that a decision of the Comptroller of the Currency that he was unfit for the position deprived him of liberty and property without due process of law. The Fifth Circuit rejected the claim, finding no clearly established right to property or liberty interest in being a president designate, for the position was contingent upon regulatory approval. 876 F.2d at 1213, 1214. See also, *White v. Office of Personnel Management*, 787 F.2d 660, 663 (D.C. Cir.), *cert. denied*, 107 S. Ct. 276 (1986) (unsuccessful applicant for ALJ position had no property interest in the job).

Official immunity questions are to be decided on the basis of the nature of the functions performed by the defendant, not on the defendant, position in the government. *Harlow v. Fitzgerald*, 457 U.S. at 807, 811-12; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n. 30; *Butz v. Economou*, 438 U.S. 478, 511 (1978). Here defendant Behrens was actually an appointee of the Board and the FSLIC, and performing federal functions entrusted to him by statute and regulations. His letter to Pioneer was on Board letterhead and executed in his capacity as Supervisory Agent. He is thus, under decisional law such as *Connelly v. Comptroller of the Currency*, entitled to qualified immunity from suit.[6] See,

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[6] Nothing in *Meyer v. Fidelity Sav.*, 944 F.2d 562 (1991) is to the contrary. *Meyer* was a suit for damages brought by the executive vice-president of a California-based thrift institution, arising out of the termination of the vice-president's employment by Robert Pattullo, a special representative for the FSLIC. Although the *Bivens* claim was based on an assertion that Pattullo had wrongfully terminated the plaintiff from his position

Maraziti v. First Interstate Bank, No. 90-56001, (9th Cir., decided January 3, 1992) (the right the official is claimed to have violated must have been clearly established in a particularized sense before immunity can be defeated).

(2). Substitution of the United States

(a). Clearly, the United States should have been substituted for Behrens under the Federal Employees Liability Reform and Tort Compensation Act of 1988, and the suit permitted to proceed to judgment under the FTCA.

The Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation are federal agencies under the FTCA. See, 28 U.S.C. 2671 (federal agency includes independent establishments of the United States).

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as bank vice-president, this Court held that the facts alleged did not support a claim of violation of clearly established law. 944 F.2d at 576. In reaching this conclusion, the Court noted that "[r]ules governing federally insured institutions * * * make for treacherous law," 944 F.2d at 577, and that "in light of the complex nature of Meyer's entitlement," Pattullo was immune from a suit for damages. *Id.*

In any event, in *Meyer* the bank officer removed had been with the financial institution for 16 years, and he was allegedly terminated by the FSLIC without notice. Pelletier, on the other hand, had been a managing officer of a *de novo* thrift institution for less than a year and was subject to a regulatory scheme that quite plainly required that his position be subject to approval by the Board. Moreover, the government in this case did not order Pelletier terminated – that decision was made by Pioneer, a private institution.

It is equally clear that Behrens is a federal employee under the FTCA, even though his salary was paid by the FHLB-SF, a privately owned institution. The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980); *Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965). Under the FTCA, the term "employee"of the government" includes "officers or employees of any federal agency," members of the military or naval forces of the United States, and most importantly for our purposes, "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. This definition was intended to be read liberally. See *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972); *Ferguson v. United States*, 712 F.Supp. 775, 781 (N.D. Cal. 1989). The definition clearly covers Behrens, who was a properly appointed Supervisory Agent. Board regulations explicitly state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent, *shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation.*" 12 C.F.R. 501.10 (emphasis added).

(b). The remaining question is whether Behrens was acting within the scope of his employment when he declined to approve or disapprove Pelletier until the BHSL investigation had been completed. The district court determined that he was not acting within scope, but this was error. An employee is acting within the scope of his employment under the law of California "when he is engaged in work he was employed to perform, or when

the act is incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience." See 29 Cal. Jur. 3d, Section 107, page 743 (1986 ed.).[7] Under the California standard, there is no doubt that Behrens was simply performing his job, and thus was within the scope of his employment. As a duly appointed Supervisory Agent, Behrens was authorized by statute to act broadly in the agency's interests. See 12 C.F.R. 501.11(e); 12 C.F.R. 571.6. Since under the regulations the agency "is required to reject an applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe," 12 C.F.R. 571.6(b), and "may reject an applicant if the character of the management is questionable," *id.*, Behrens was acting within the scope of his authority when, on behalf of the agency, he declined to approve or disapprove Pelletier as president of Pioneer. Plainly, there was ample evidence that the plaintiff had mismanaged the Beverly Hills Savings & Loan Association, prior to his association with Pioneer. Moreover, Behrens took his action pursuant to Bank Board Resolution No. 84-164 (March 29, 1984), which conditioned Pioneer's insurance on its agreement to employ "a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent."

In sum, the United States should have been substituted for the defendant under the Reform Act.

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[7] To exonerate an employer from liability for his employee's action, "the employee's deviation from his duty must be for entirely personal purposes." See *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 227 Cal Rptr 106 (1986).

C. The Public Interest And Lack Of Harm To Pelletier

These final factors are self-evident, and need little discussion. They favor granting the stay.

The public interest clearly lies in staying the district court trial pending appeal. Behrens will be irreparably harmed by a trial, and so will the public interest in having the decisions of this Court and the Supreme Court followed – decisions which hold that immunity is to be determined *prior* to trial.

No irreparable harm will be caused the plaintiff by such actions. Indeed, staying trial until this appeal is decided will help all parties by having a definitive ruling on immunity, and a clear indication from this Court whether the defendant was acting with scope. As we have already pointed out, without a definitive ruling from this Court on the scope issue, the trial proceedings will be confused and unworkable, since many of plaintiff's causes of action against the United States are not maintainable if the defendant was acting outside the scope of his employment.

CONCLUSION

For the foregoing reasons, a stay of all trial proceedings in the district court, pending appeal, is respectfully requested.

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No. 94-1244

In The

Supreme Court of the United States

October Term, 1994

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
Volume II, Pages 210 to 419

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INDEX

Page

VOLUME I

Chronological List of Relevant Docket Entries 1

Plaintiff's First Amended Complaint, EOD February 23, 1989 7

District Court's Order Vacating Order Staying Discovery, EOD September 11, 1989 25

District Court's Order Denying Defendant's Motion to Dismiss, EOD October 5, 1989 26

Defendant's Answer, EOD October 30, 1989 30

Defendant's Notice of Appeal, EOD November 2, 1989 42

Defendant/Appellant's Motion for Stay, EOD February 5, 1990 51

Defendant/Appellant's Brief, EOD March 6, 1990 72

Court of Appeals' Order Denying Stay, EOD March 14, 1990 127

Plaintiff/Appellee's Brief in Opposition, EOD April 17, 1990 128

Defendant/Appellant's Reply Brief, EOD May 1, 1990 158

Court of Appeals' Order Requesting Supplemental Briefs, EOD January 6, 1992 187

Defendant/Appellant's Motion to Stay, EOD January 24, 1992 189

INDEX – Continued

Page

VOLUME II

Defendant/Appellant's Supplemental Brief, EOD January 28, 1992 210

Court of Appeals' Order Granting Stay, EOD January 31, 1992 227

Plaintiff/Appellee's Supplemental Brief in Opposition, EOD February 10, 1992 228

Defendant/Appellant's Supplemental Reply Brief, EOD February 19, 1992 255

Court of Appeals' Order Affirming, Reversing, and Remanding, EOD June 29, 1992 ... Pet. App. 10a

Defendant/Appellant's Petition For Panel Rehearing, EOD August 12, 1992 269

Court of Appeals' Order Denying Rehearing, EOD September 24, 1993 282

Defendant's Memoranda in Support of Summary Judgment, EOD March 1, 1994 283

Plaintiff's Memorandum in Opposition to Summary Judgment, EOD March 14, 1994 310

Defendant's Reply to Opposition to Summary Judgment, EOD March 21, 1994 333

District Courts' Order Denying Summary Judgment, EOD September 6, 1994 ..... Pet. App. 2a

Plaintiff's Application to Certify Appeal as Frivolous, EOD November 1, 1994 359

Defendant's Opposition to Application, EOD November 3, 1994 367

INDEX – Continued

Page

District Court's Order Certifying Appeal as Frivolous, EOD November 7, 1994 ..... Pet. App. 8a

Plaintiff/Appellee's Motion to Dismiss Appeal, EOD November 9, 1994 373

Defendant/Appellant's Opposition to Motion to Dismiss Appeal, EOD November 14, 1994 384

Plaintiff/Appellee's Reply in Support of Motion to Dismiss Appeal, dated November 16, 1994 415

Court of Appeals' Order Dismissing Appeal, EOD November 17, 1994 ..... Pet. App. 1a

DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF, EOD JANUARY 28, 1992

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF
SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLANT BEHRENS

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TABLE OF CONTENTS

Page

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

QUESTIONS PRESENTED 2

FACTUAL BACKGROUND 2

ARGUMENT 4

I. IN THE NINTH CIRCUIT, DENIALS OF MOTIONS TO DISMISS BASED ON QUALIFIED IMMUNITY ARE IMMEDIATELY APPEALABLE..... 4

II. THE ORDER DENYING SUBSTITUTION IS IMMEDIATELY APPEALABLE UNDER THE COHEN COLLATERAL ORDER DOCTRINE 7

CONCLUSION 12

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Creighton, 483 U.S. 635 (1987) 4, 7

Baker v. Racansky, 887 F.2d 183 (9th Cir. 1989) 4

Barr v. Matteo, 360 U.S. 564 (1959) 8

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 1, 4, 6, 7, 10, 11

Compania Mexicana De Aviacion v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988)..... 5

DeVargas v. Mason & Hanger-Silas Mason, Co., 844 F.2d 714 (10th Cir. 1988)..... 7

Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)..... 4

Johnson v. Carter, 939 F.2d 180 (4th Cir. 1991)..... 10

Lutz v. Secretary of the Air Force, 944 F.2d 1477 (1991) 5

Maraziti v. First Interstate Bank, No. 90-56001 (9th Cir., Jan 3, 1992) 4

Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989)..... 5

Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990)..... 10

Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990)..... 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1-3, 5, 6, 10

Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990)..... 11

Nixon v. Fitzgerald, 457 U.S. 731 (1982)..... 1, 2, 10

Schlegel v. Bebout, 831 F.2d 881 (9th Cir. 1987)..... 5

Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991) 4

Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990)..... 7

United States v. Smith, 111 S. Ct. 1180 (1991) 9, 12

Velasquez v. Senko, 813 F.2d 1509 (9th Cir. 1987) 6

Westfall v. Erwin, 484 U.S. 292 (1988).....7-10, 12

Williams v. Brooks, 945 F.2d 1322 (5th Cir. 1991) 4

Yalkut v. Gemignani, 873 F.2d 31 (2d Cir. 1989)..... 11

Statutes:

28 U.S.C. 1331..... 1

28 U.S.C. 2679(b) 9

28 U.S.C. 2679(d)(2)..... 11

Legislative Materials:

H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News ("USCCAN") 5945.....9, 10

IN THE UNITED STATES COURT OF APPEALS
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No. 89-56265

ROBERT J. PELLETIER,

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CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLANT BEHRENS

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331. The district court's denial of the motion to substitute the United States as defendant, as required by

the Federal Employees Liability and Tort Reform Compensation Act of 1988, and the district court's denial of qualified immunity, are, we assert, interlocutory orders appealable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

This Supplemental Brief is being filed pursuant to the Court's order of January 6, 1992.

QUESTIONS PRESENTED

1. Whether the denial of a motion to dismiss based on qualified immunity claim is immediately appealable in the Ninth Circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

2. Whether the denial of a request for substitution of the United States as defendant under the Reform Act is immediately appealable under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

FACTUAL BACKGROUND

1. The defendant-appellant John Behrens, a Supervisory Agent of the Federal Home Loan Bank Board, was sued by the plaintiff who asserted, *inter alia*, a *Bivens* cause of action for the alleged commission of constitutional torts, and a cause of action for the alleged commission of common law torts.

The district court declined to dismiss the *Bivens* count and also declined to grant defendant's motion for qualified immunity. The court also appeared to deny

defendant's motion seeking substitution of the United States on the common law counts, as required by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Reform Act").

The defendant then appealed the lower court's immunity rulings to the Ninth Circuit.

2. The appeal was duly briefed, and was argued before a panel of the Court on April 4, 1991. However, on May 2, 1991, the panel remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling." If no ruling had been made, the district court was instructed to rule on the issue. On July 24, 1991, submission of the appeal was vacated "pending order of the Court."

3. On July 29, 1991, the district court entered an order stating that it had not ruled on the substitution issue, and requiring further briefing on that issue.

Thereafter, on October 8, 1991, the district court issued a second order, one that addressed the substitution issue. The lower court ruled that the federal defendant, John Behrens, was not acting with the scope of his employment at the time the alleged acts occurred. Accordingly, the court held that there could be no substitution of the United States as defendant under the Reform Act.

4. After the purpose of the limited remand to the district court had been met, this Court, by order of

January 6, 1992, reinstated the appeal and requested supplemental briefs from the parties on two issues: "whether denial of a motion to dismiss based on qualified immunity is immediately appealable in this circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and whether denial of a request for substitution under the FELRTCA is likewise immediately appealable."

This Supplemental Brief responds to the Court's January 6, 1992 order.

ARGUMENT[1]

I.

IN THE NINTH CIRCUIT, DENIALS OF MOTIONS TO DISMISS BASED ON QUALIFIED IMMUNITY ARE IMMEDIATELY APPEALABLE.

This Court has asked for supplemental briefs on the question whether interlocutory appeals from denials of qualified immunity may be taken at the motion to dismiss stage. This question suggests that while such interlocutory appeals may be taken at the summary judgment stage, (see, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987)), it is questionable whether appeals may be taken at an earlier stage of the proceedings. We demonstrate below that, under the law of this Circuit and the law of the Supreme Court, official immunity issues must be decided at the earliest possible stage of the proceedings; and that,

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[1] The two issues addressed in this Supplemental Brief are issues of law reviewable *de novo*. See, *Baker v. Racansky*, 887 F.2d 183, 185 (9th Cir. 1989); *Maraziti v. First Interstate Bank*, No. 90-56001 (9th Cir., Jan. 3, 1992) (Slip op. at 27-28).

accordingly, when a motion to dismiss based on qualified (or absolute) immunity is denied, an immediate interlocutory appeal from that denial may be taken to this Court.

A. In this Circuit, as in the other circuits,[2] denials of motions to dismiss based on qualified immunity are appealable interlocutory orders. This Court, in *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991), recognized this principle. The Court wrote:

> Although an order denying a motion to dismiss is not a "final decision" as that term is ordinarily used in 28 U.S.C. 1291, the denial of a claim to qualified immunity is appealable under the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), notwithstanding the absence of a final judgment.

Similarly, in *Compania Mexicana De Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988), the Court observed that

> A denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law. The entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost is a case is erroneously permitted to go to trial.

In *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), the Court held that a denial of a motion to dismiss based on immunity was immediately appealable. And in *Lutz v. Secretary*

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[2] See, *e.g.*, *Schrob v. Catterson*, 948 F.2d 1402 (3d Cir. 1991); *Williams v. Brooks*, 945 F.2d 1322 (5th Cir. 1991).

of the Air Force, 944 F.2d 1477 (1991), this Court ruled that it had jurisdiction to hear an interlocutory appeal from a motion to dismiss based on the *Feres* doctrine. In upholding its jurisdiction, the Court reasoned that the *Feres* doctrine was similar to the doctrine of official immunity, and that because the Supreme Court in *Mitchell v. Forsyth* had ruled that such denials of immunity were immediately appealable, the denial of a motion to dismiss based on *Feres* was immediately appealable as well. The law of the circuit, accordingly, is well-established, and supports the interlocutory appeal of qualified immunity in this case. See, also *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) (district court's denial of Guam's motion to dismiss on immunity grounds is immediately appealable.

B. These holdings of the Ninth Circuit are consistent with the holdings of the Supreme Court. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court held that a claim of qualified immunity should be heard at the earliest possible stage in the litigation, and that denials of qualified immunity were appealable at both the motion to dismiss and summary judgment stage. 472 U.S. at 527. As this Court has explained, the Supreme Court in *Mitchell* "held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under *Cohen*." See, *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987).

C. There can be no doubt, in sum, that under the law of the Supreme Court and the law of the Ninth Circuit a district court's denial of a motion to dismiss based on qualified immunity is an appealable order. While the Supreme Court in *Mitchell* held that a district

court's denial of a claim of qualified immunity is appealable "to the extent that it turns on an issue of law," 472 U.S. at 530, this is the classic case where the appeal of the denial of qualified immunity does involve a pure issue of law. Plaintiff's complaint turns on one undisputed document, the letter written by defendant Behrens on behalf of the Federal Home Loan Bank Board advising an applicant financial institution that because of an ongoing FSLIC investigation, "this office is unable at this time to proceed with the application [seeking approval of plaintiff Pelletier as president]." The sole question presented, therefore, is whether in writing this letter a reasonable person would have thought he was violating clearly established law. This is the classic case for a grant of qualified immunity, and a proper case for appealing the district court's failure to grant the motion to dismiss on qualified immunity grounds.[3]

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[3] We note that the Tenth Circuit has concluded that "the Supreme Court's approval of an interlocutory appeal in a fact-specific case like *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)], in which the district court denied a pre-trial qualified immunity defense motion, compels us to take an appeal, we believe, in all cases in which the denial is grounded upon a finding that disputed material facts exist in the case. Our task in such an appeal is * * * to determine whether * * * there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial." *DeVargas v. Mason & Hanger-Silas Mason, Co.*, 844 F.2d 714, 719 (10th Cir. 1988). See also, *Stewart v. Donges*, 915 F.2d 572, 575 n.2 (10th Cir. 1990).

II.

THE ORDER DENYING SUBSTITUTION IS IMMEDIATELY APPEALABLE UNDER THE COHEN COLLATERAL ORDER DOCTRINE

A denial of substitution under the Reform Act is also an immediately appealable interlocutory order, because denying substitution denies the defendant absolute immunity from suit.

A. The Federal Employees Liability Reform and Tort Compensation Act of 1988 was enacted by Congress soon after the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Supreme Court addressed the immunity of federal employees for common law torts arising out of their official actions. Prior to the *Westfall* decision, it was widely understood that federal employees enjoyed absolute immunity from common law tort claims as long as they were acting within the scope of their employment. *See, e.g., Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion). In *Westfall*, however, the Supreme Court held for the first time that absolute immunity was not available "unless the challenged conduct is within the outer perimeter of an official's duties *and* is discretionary in nature." 484 U.S. at 300 (emphasis added).

By adding the requirement that a federal employee's actions be "discretionary in nature," the Court significantly restricted the previously recognized scope of absolute immunity for common law torts. At the same time, however, the Supreme Court invited Congress to review by legislation the standard it had adopted. The Court stated that "Congress is in the best position to provide

guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. The Court added that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Ibid.* Within 10 months, Congress responded to the Court's invitation by enacting legislation to overturn the *Westfall* decision. The Reform Act restored the absolute immunity of government employees for acts within the scope of their employment by requiring plaintiffs in such cases to proceed exclusively against the United States under the Federal Tort Claims Act ("FTCA").

The heart of the Reform Act lies in Sections 5 and 6, which amended the FTCA. Section 5 amended 28 U.S.C. § 2679(b) to provide that the FTCA remedy against the United States for negligent or wrongful acts by government employees acting within the scope of their employment "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act gave rise to the claim * * * ." As a result, in the words of the House Report on the Reform Act, "the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual Federal employee or his estate if such action or proceeding would sound in common law tort." H.R. Rep. No. 700, 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News ("USCCAN") 5945, 5949. Congress's purpose in enacting this exclusive-remedy scheme was to render federal employees "immune for personal liability" for actions within the scope of their employment, thereby "return[ing] [them] to the status

they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947.

B. The history of the Reform Act makes it clear that Congress, by statute, has now given federal employees sued for common law torts absolute immunity from suit – thus "return[ing] [them] to the status they held prior to the *Westfall* decision." *Id.* at 4, 1988 USCCAN at 5947. This conclusion has been reached by the Supreme Court. Writing last term in *United States v. Smith*, 111 S. Ct. 1180 (1991) the Court observed as follows:

> The Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*." 111 S. Ct. 1180, 1183 (1991).

Other courts have recognized that the Reform Act bestows an absolute immunity on federal employees. For instance, in *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), the Third Circuit held that the primary purpose of the Reform Act was "to return federal employees to the status they held prior to the *Westfall* decision, *that is, a status of absolute immunity for activities within their scope of employment.*" 912 F.2d at 639 (emphasis added), quoting H.R. Rep. No. 100-7000, 100th Cong., 2d Sess., *reprinted in* 1988 USCCAN 5945, 5047. In *Johnson v. Carter*, 939 F.2d 180, 183 n.4 (4th Cir. 1991), the Fourth Circuit observed that in the Reform Act "Congress restored the absolute immunity of government employees for acts within the scope of their employment * * * ."

C. Given that the Reform Act, through the mechanism of substitution of the United States as defendant, is

intended to give federal employees charged with common law torts absolute immunity, it follows that a denial of substitution is immediately appealable. In *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), the Supreme Court held that an order denying a claim of absolute immunity is immediately appealable under the three-pronged test of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (denials of absolute immunity are immediately appealable under the *Cohen* collateral order doctrine since an official's immunity is not a mere immunity from liability, but an "immunity from suit," which is lost if the case is permitted to proceed to discovery and trial).

D. The federal courts of appeals have viewed denials of substitution under the Reform Act as denials of absolute immunity that are immediately appealable under *Nixon*. See, *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (where district court remand order effectively denies employee Reform Act immunity, the order is appealable under *Cohen*); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (district court order declining to rule on scope and remanding to state court appealable); *Yalkut v. Gemignani*, 873 F.2d 31 (2d Cir. 1989) (denial of substitution is an appealable order). As the Second Circuit wrote in *Gemignani*:

> The Reform Act broadened the scope of immunity; now, as long as an official is acting within the scope of his or her employment, the official's tortious actions are protected * * * . The question whether [defendants] * * * were acting within the scope of their employment is not one that is inextricably bound with the merits or facts of this case, and so the denial of immunity is appealable. [873 F.2d at 34]

Moreover, when a denial of substitution occurs, the court is constructively dismissing the United States from the lawsuit, in violation of 28 U.S.C. 2679(d)(2). Such a constructive dismissal also meets the requirements of the *Cohen* collateral order doctrine and is thus immediately appealable.

Clearly, the district order denying substitution under the Reform Act is an order that denies the defendants absolute immunity. As such it is immediately appealable under the *Cohen* collateral order doctrine. Holding that denials of substitution cannot be immediately appealed simply cannot be reconciled with Congress' intention in passing the Reform Act, which was to "establish[] the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall.*" *United States v. Smith,* 111 S. Ct. at 1183.

CONCLUSION

For the foregoing reasons, and the reasons stated in the appellant's opening brief and reply brief, the orders of the district court on qualified immunity and substitution should be reversed.

Respectfully submitted,

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COURT OF APPEALS' ORDER GRANTING STAY, EOD JANUARY 31, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Jan. 31, 1992)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior U.S. District Court Judge

The proceedings in the district court are stayed pending our resolution of this appeal, No. 89-56265, or until further order of this court.

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION, EOD FEBRUARY 10, 1992

(Filed Feb. 10, 1992)

Nos. 89-56265 and 92-55023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA D.C. No. CV 89-0969-RMT

SUPPLEMENTAL BRIEF OF APPELLEE PELLETIER

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE 3

ARGUMENT 7

QUALIFIED IMMUNITY APPEAL 8

Qualified Immunity is Not Available to Private Parties 10

Behrens' Appeal Does not Raise Narrow Legal Issues Permitted for Interlocutory Appeal 11

SUBSTITUTION APPEAL 14

PELLETIER SHOULD BE AWARDED ATTORNEYS FEES 19

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

F.E. Trotter, Inc. vs. Watkins (9th Cir.1989) 869 F.2d 1312 ..... 2, 8, 10, 11

Fry vs. Melaragno (9th Cir. 1991) 939 F.2d 832 ..... 9, 10

Greene vs. McElroy (1959) 360 U.S. 474 12

Greenlaw vs. California Department of Benefit Payments (E.D. Cal 1976) 413 F.Supp. 420 9

Keker vs. Procunier (E.D. Cal. 1975) 398 F. Supp. 756 9

Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach (9th Cir. 1989) 881 F.2d 816 ..... 2, 8

Meridian Intern. Logistics, Inc. vs. U.S. (9th Cir. 1991) 939 F.2d 740 ..... 9, 15

Merritt vs. Mackey (9th Cir. 1987) 827 F.2d 1368 12

Meyer vs. Fidelity Savings (9th Cir. 1991) 944 F.2d 562 13

Mitchell vs. Carlson (5th Cir. 1990) 896 F.2d 128 16

Mitchell vs. Forsyth (1985) 472 U.S. 511 ..... 2, 3, 8, 9, 10

Morrison vs. Jones (9th Cir. 1979) 607 F.2d 1269 9

Nasuti vs. Scannell (1st Cir. 1990) 906 F.2d 802 16

Scheuer vs. Rhodes (1974) 416 U.S. 232 9

Schwartzman vs. Valenzuela (9th Cir. 1988) 846 F.2d 1209 8

Truax vs. Raich (1915) 239 U.S. 33 12

United States vs. Briggs (5th Cir. 1975) 514 F.2d 794 12

Valasquez vs. Senko (9th Cir. 1987) 813 F.2d 1509 17

Yalkut vs. Gemignani (2nd Cir. 1989) 873 F.2d 31 ..16, 17

STATE CASES

Bautista vs. Jones (1945) 25 Cal. 2d 746 13

Endler vs. Schutzbank (1968) 68 Cal. 2d 162 12

KGB, Inc. vs. Giannoulas (1980) 104 Cal. App. 3d 844 13

New Method Laundry Co. vs. MacCann (1916) 174 Cal. 26 12

Purdy & Fitzpatrick vs. State of California (1969) 71 Cal. 2d 566 12

Townsend vs. Los Angeles County (1975) 49 Cal. App. 3d 263 12

FEDERAL STATUTES

Financial Institutions Reform, Recovery, and Enhancement Act of 1989, Pub. Law No. 101-73, 101 Stat. 183 at § 403 and 722 10

5 *U.S.C.* § 552A(g)(1) 1

5 *U.S.C.* § 701-706 6

5 *U.S.C.* § 702 1

12 *U.S.C.* § 1431 and 1437 1

12 *U.S.C.* § 1464(d)(4) 11

12 *U.S.C.* §§ 1730 ..... 4, 7, 11, 12, 13

28 *U.S.C.* § 1331 1

28 *U.S.C.* § 1927 19

28 *U.S.C.* § 2201 and 2202 1

28 *U.S.C.* § 2679 ..... 3, 14

MISCELLANEOUS

12 *C.F.R.* § 501.11 4

Rule 14(a) *F.R.C.P.* 5

California Constitution, Art 1, § 1 13

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-56265 and 92-55023

ROBERT J. PELLETIER,

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vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA D.C. No. CV 89-0969-RMT

SUPPLEMENTAL BRIEF OF APPELLEE PELLETIER

STATEMENT OF JURISDICTION

Jurisdiction exists in the District Court pursuant to 28 *U.S.C.* § 1331; 5 *U.S.C.* § 552A(g)(1); 5 *U.S.C.* § 702; 12 *U.S.C.* § 1431 and 1437; 28 *U.S.C.* § 2201 and 2202; and pendant jurisdiction.

This supplemental brief is submitted pursuant to this Court's January 6, 1992, order so as to address the issue of jurisdiction in this Court over these interlocutory

appeals. Plaintiff-Appellee Robert J. Pelletier ("Pelletier") asserts that there is no jurisdiction in this Court insofar as Defendant-Appellant John W. Behrens ("Behrens") seeks to have this Court review (i) the denial by the Court below of Behrens' motion to dismiss Claims One and Two (the "Bivens claims") based upon Behrens' purported claim of qualified immunity from those claims and (ii) the denial by the Court below of Behrens' motion to substitute the United States of America in Behrens' place on Claims Five through Eight (the "common law tort claims"). The issue of jurisdiction will be discussed more fully *infra*.

Pelletier asserts that in an interlocutory appeal, this Court's jurisdiction is limited to reviewing a narrow and purely legal issue concerning qualified immunity. That narrow issue would be whether Pelletier has alleged in the complaint a "clearly established right" which was violated by wrongful conduct. *Mitchell vs. Forsyth* (1985) 472 U.S. 511, 527-530 and *Manhattan Beach Police Officers Ass'n vs City of Manhattan Beach* (9th Cir. 1989) 881 F.2d 816, 817-818. Pelletier asserts a lack of jurisdiction because Behrens was not a government employee; and, thus, qualified immunity is not available to Behrens. *F.E. Trotter, Inc. vs. Watkins* (9th Cir. 1989) 869 F.2d 1312, 1318. Further, Behrens does not appear to raise the "clearly established right" issue by this appeal.

Pelletier asserts that there is no jurisdiction to review by interlocutory appeal a denial of a motion to substitute, particularly when the appeal addresses only disputed factual findings by the Court below.

STATEMENT OF ISSUES

Pursuant to this Court's January 6, 1992, order, two issues are properly discussed in the supplemental briefs.

1. Is a denial of a motion to dismiss based on a qualified immunity claim immediately appealable in this circuit under *Mitchell vs. Forsyth* (1985) 472 U.S. 511?

2. Is a denial of a request for substitution of the United States as a defendant under the Westfall Act (28 *U.S.C.* § 2679) immediately appealable in this circuit?

STATEMENT OF THE CASE

This supplemental brief is submitted by Plaintiff and Appellee Robert J. Pelletier ("Pelletier") in response to the supplemental brief of Defendant and Appellant John W. Behrens ("Behrens"). This supplemental brief is limited to issues of jurisdiction in this Court over these interlocutory appeals.

In order to understand the jurisdictional issues presented, it is necessary to understand the claims Pelletier has alleged against Behrens in the Court below.

Pelletier pursued a profession and held employment in the savings and loan industry in various executive capacities for over thirty years and until Behrens commenced the action which continues to cause him to be unable to be employed in that industry even to this day. While it is true that this industry is the subject of much criticism, the problems of this industry are not of Pelletier's causing; and he should not be required to come before this Court as a second class citizen stripped of his Constitutional rights.

In 1980, Pelletier was an officer of Beverly Hills Savings and Loan Association ("BHSL"). He served as the Senior Vice President in charge of the Major Loan Division of BHSL and the Senior Loan Committee until his resignation in March, 1984.

While BHSL was subsequently seized by the FSLIC for insolvency in April, 1985, Pelletier was not the subject of any administrative or legal action at the time Behrens committed the primary acts alleged in the complaint. It also does not appear that Behrens played any role in supervising BHSL, while Pelletier was employed.

Behrens at this time was a salaried employee of the Federal Home Loan Bank of San Francisco (the "Bank"). The Bank is admittedly not a governmental agency; and, thus, Behrens was not then nor at any time alleged in the complaint a government employee. On March 17, 1984, about the time of Pelletier's departure from BHSL, Behrens was appointed an agent of the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), both of which were government agencies. The scope of his delegated duties were set forth in 12 *C.F.R.* § 501.11. These delegated duties did not include authority which permitted Behrens to remove savings and loan executives, although FHLBB/FSLIC had such authority by statute. See former 12 *U.S.C.* §§ 1730(g), (h) and (q).

In mid-1984, Pelletier was hired by Equitable Savings and Loan Association of Orange County as its managing officer. Pelletier's employment was approved by both federal and state regulatory agencies. Pelletier performed well in this capacity until he resigned in 1985.

Pelletier was then hired by Pioneer Savings and Loan Association ("Pioneer") of Orange County as its managing officer. Pioneer had received insurance of its accounts from the FSLIC in 1984. Although there was no statutory authority for doing so, the FSLIC purported to require that for the period 1984 through 1987, Pioneer secure approval of any new managing officer by the Principal Supervisory Agent for Eleventh District of the FHLBB and FSLIC. Pioneer did not seek such approval immediately but instead entered into an unconditional written employment contract with Pelletier, who then was immediately appointed as the managing officer. Shortly after this appointment, Pioneer notified the FHLBB of Pelletier's employment and contract; but the FHLBB took no action as a result of this notification for over one year.

Pelletier's work and performance while at Pioneer was well received by not only the federal and state regulatory agencies, but also Pioneer's Board and outside accountants, Peat, Marwick, Mitchell & Company.

In May, 1986, and after Pelletier had served as Pioneer's managing officer for over a year, Behrens, acting outside of his lawful authority and with the knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board (the "Behrens Directive"). Fairly read and as held by the Court below, the Behrens Directive required Pioneer to remove Pelletier as its managing officer. Pioneer complied with this removal directive.

Pelletier sought other employment in the financial institutions area. In connection with employment interviews, Pelletier was compelled to disclose the Behrens

Directive to prospective employers. Each prospective employer declined to hire Pelletier upon learning of and because of the Behrens Directive.

Pelletier administratively sought to have the Behrens Directive retracted by the FHLBB and the FSLIC, who refused to do so and further refused to hold any administrative hearing on the matter.

Pelletier filed this action on February 17, 1989.[1]

Behrens moved to dismiss the complaint or for summary judgment based upon qualified immunity, among other grounds. By order entered October 6, 1989, the Court below denied, in part, the motions and found that the following claims had been stated against Behrens. Certain of the claims, where applicable, seek punitive damages.

A. Claims One and Two insofar as they assert acts subsequent to the Behrens Directive for violations of Constitutional rights to procedural and substantive due process. These are the Bivens claims.

B. Claim Three for injunctive relief for violation of the Administrative Procedures Act, 5 U.S.C. § 701-706.

C. Claim Five for interference with contract under California law.

D. Claims Six and Seven for intentional and negligent infliction of emotional distress for acts subsequent to the Behrens Directive under California law.

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[1] These claims were previously asserted in a third party complaint in a separate action and dismissed pursuant to Rule 14(a) *FRCP.*

E. Claim Eight for negligence under California law.

The Court below denied the motion for summary judgment without prejudice because of the factual issues which required discovery.

Upon remand from this Court, the Court below sought further briefs and evidence on the issue of whether Behrens was acting within the course and scope of his agency relationship when he committed the acts alleged in the complaint. The outcome of such determination would decide whether Behrens was entitled to have the United States substituted in his place as to the common law tort claims. By order entered October 9, 1991, the Court below denied the substitution request finding on the basis of the evidence and authority that:

A. Behrens, in fact, directed Pioneer to *remove* Pelletier from his position as a managing officer;

B. The FHLBB had the Congressionally mandated power to so *remove* Pelletier under a procedure which provided for due process;

C. There is no evidence that the FHLBB ever delegated this power to Behrens or his supervisor; and

D. Therefore, Behrens acted beyond his authority when he *removed* Pelletier as Pioneer's managing officer.

The essence of this order is a finding that Behrens intentionally issued his own unauthorized removal and prohibition order directed against Pelletier and that at that time such an order may only have been issued by the FHLBB under a process which provided Pelletier with due process. See former 12 *U.S.C.* § 1730.

The only issues addressed in this supplemental brief are whether this Court has jurisdiction over the issues raised by Behrens' appeals (i) from the denial of his motion to dismiss Claims One and Two of the complaint based upon a defense of qualified immunity and (ii) from the lower Court's October 9, 1991, denial of Behrens' request to have the United States substituted in his place as to Claims Five through Eight of the complaint.

ARGUMENT

Pelletier asserts that while an interlocutory appeal may be taken from a denial of a motion to dismiss based upon a claim of qualified immunity, Behrens' appeal from the October 6, 1989, order of the Court below does not fall within this limited jurisdiction for two reasons. First, Behrens was admittedly not a governmental employee at the time of the acts alleged in the complaint. Secondly, an appeal may only lie from a legal determination and not on the factual grounds raised in Behrens' appeal.

Pelletier asserts that there is no right to an immediate appeal of a denial of a motion to substitute, particularly when such denial is based upon a factual determination of whether the defendant's conduct was outside or beyond the scope of authority.

QUALIFIED IMMUNITY APPEAL

The United States Supreme Court and this Court have held that there is a narrow review of the issue of qualified immunity in the case of an interlocutory appeal taken before any trial has occurred. *Mitchell vs. Forsyth*

(1985) 472 U.S. 511, 527-530 and *Manhattan Beach Police Officers Ass'n vs. City of Manhattan Beach* (9th Cir. 1989) 881 F.2d 816, 817-818. The defense of qualified immunity is only available to government employees and not private parties. *F.E. Trotter, Inc. vs. Watkins* (9th Cir. 1989) 869 F.2d 1312, 1318.

Any interlocutory jurisdiction was criticized by this Court in both *City of Manhattan Beach, supra,* and *Schwartzman vs. Valenzuela* (9th Cir. 1988) 846 F.2d 1209, 1210. This criticism is based on the view that such interlocutory appeals for the most part are simply frivolous, knee-jerk reactions. Pelletier asserts that such is the case in this appeal.

> As this Court held in *City of Manhattan Beach, supra:* [O]ur task is not to determine whether defendants' conduct actually violated clearly established statutory or constitution rights when the facts are in dispute. Rather the Supreme Court has said that in an interlocutory appeal from a denial of a motion for summary judgment on qualified immunity, our inquiry should be limited to deciding whether the "legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions."

Thus, the only issue which would be reviewed on an interlocutory appeal is the purely legal issue of whether the rights as alleged in the complaint were "clearly established". Factual issues are not properly raised in such an interlocutory appeal.

The Supreme Court in *Mitchell, supra* at 526, discussed the rationale for permitting such interlocutory

appeals as being justified to avoid a federal employee from undergoing discovery if the plaintiff has failed to allege the violation of a "clearly established right". While the *Mitchell* Court further suggested that such an interlocutory appeal could be taken from a denial of a motion to dismiss which tested the complaint allegations, *Mitchell*, in fact, arose on a summary judgment motion.

Earlier decisions suggested that these issues should not be decided on a motion to dismiss. See *Scheuer vs. Rhodes* (1974) 416 U.S. 232, 243, 250; *Morrison vs. Jones* (9th Cir. 1979) 607 F.2d 1269, 1274; *Greenlaw vs. California Department of Benefit Payments* (E.D. Cal. 1976) 413 F.Supp. 420, 426 and *Keker vs. Procunier* (E.D. Cal. 1975) 398 F.Supp. 756, 767.

After the initial briefing in this appeal, this Court decided *Fry vs. Melaragno* (9th Cir. 1991) 939 F.2d 832. In *Fry*, this Court held that there is jurisdiction in this Court to hear an interlocutory appeal from a denial of such a motion to dismiss. *Fry* is the only reported decision of this Court on this point. Most of the decisions concern an interlocutory appeal following a denial of a motion for summary judgment.[2]

Thus, insofar as Behrens' claim to qualified immunity is concerned, the issue is whether Behrens' appeal raises the narrow issues permitted by *Mitchell* and *Fry, supra.*

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[2] Pelletier questions the wisdom of permitting such an interlocutory appeal at the pleading stage because liberal pleading rules should permit a plaintiff to amend to allege a "clearly established right" violation, if one exists.

Pelletier asserts that this appeal does not fall within the narrow range of permissible appeals.

Qualified Immunity is Not Available to Private Parties

The first basis for Pelletier's assertion of lack of jurisdiction in this Court is the fact alleged in the complaint and admitted by Behrens that at the time of the wrongful acts, Behrens was not a government employee. Rather, he was a private party employed by the Bank.

This Court has held that "qualified immunity is not available as a defense to private parties in a Bivens suit" and that "private parties are not entitled to qualified immunity for Bivens claims." *Watkins, supra,* at 1318. This decision is controlling and resolves the only issue conceivably before the Court.

Behrens admits that he is a private party. He admits that he is a salaried employee of the Bank, which itself is not a federal agency. Rather, the Bank is a federally chartered corporation whose stock is owned by its member associations in large part. Indeed and until recently, the Bank derived income with which to pay Behrens' salary from charging its member thrifts for supervision/examination.

This situation only recently changed pursuant to the Financial Institutions Reform, Recovery, and Enhancement Act of 1989 ("FIRREA"), Pub. Law No. 101-73, 101 *Stat.* 183 at § 403 and 722. Thus, it took a recent act of Congress to transfer back to the federal government the supervision of thrifts which to that time had been accomplished by the member home loan banks. Were this issue

to arise today, a qualified immunity defense might be available because all regulators are now government employees.

Behrens claims that his conduct was that of an agent of the FHLBB. A similar claim was presented and rejected by this Court in *Watkins, supra.*

Additionally, the delegation of authority Behrens cites does not support his position. Nothing in the regulations or the FHLBB resolution permitted Behrens to remove a thrift official from his job. That is a power held exclusively by the FHLBB/FSLIC. See the Home Owners Loan Act of 1933, at 12 *U.S.C.* § 1464(d)(4) and § 1730(b), (e) and (g). The Court below so held in its October 9, 1991, denial of substitution order.

As a result, Behrens has failed to demonstrate that he falls within a protected category that may claim qualified immunity. This Court has held that a private party may not assert such a defense to a Bivens claim. The mere fact that a party who is not entitled to a qualified immunity defense asserts such a defense does not provide this Court with jurisdiction over the issue. It is only in those circumstances where the complaint alleges that the defendant was a governmental employee that such an interlocutory appeal is allowed from the denial of a motion to dismiss. Pelletier has alleged the contrary.

Behrens' Appeal Does not Raise Narrow Legal Issues Permitted for Interlocutory Appeal

The bulk of Behrens' supplemental brief is directed to authorities which permit a government employee to take an interlocutory appeal. Behrens' supplemental brief is

strangely silent on the actual issues raised by Behrens in his appeal. The reason is that Behrens essentially concedes that Pelletier has alleged a violation of a "clearly established right". The right allegedly violated by Behrens is Pelletier's constitutionally protected right to private employment free from governmental interference, which right was violated by the Behrens Directive and the continuing refusal to retract same knowing it continuing effect.

Pelletier's constitutional rights were clearly entrenched under federal law and California law long prior to the conduct alleged and are codified by Congress' enactment of a specific statute which must be followed if a financial institution officer is to be removed by the "regulators".

The federal case authority on this issue is best found in the landmark decision of *Greene vs. McElroy* (1959) 360 U.S. 474. The holding is found at page 492, as follows:

> The right to hold specific *private* employment and to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. . . .

See also *Truax vs. Raich* (1915) 239 U.S. 33; *Merritt vs. Mackey* (9th Cir. 1987) 827 F.2d 1368, 1370 and *United States vs. Briggs* (5th Cir. 1975) 514 F.2d 794, 798.

California courts, as well, have firmly protected citizens from arbitrary governmental threats to their employment and profession. One important case has nearly identical facts. *Endler vs. Schutzbank* (1968) 68 Cal.2d 162. See also *Townsend vs. Los Angeles County*

(1975) 49 Cal.App.3d 263, 267; *New Method Laundry Co. vs. MacCann* (1916) 174 Cal. 26, 31; *Purdy & Fitzpatrick vs. State of California* (1969) 71 Cal.2d 566, 579; *Bautista vs. Jones* (1945) 25 Cal.2d 746, 749; *KGB, Inc. vs. Giannoulas* (1980) 104 Cal.App.3d 844, 849; and *California Constitution, Art 1, § 1.*

The statutory method available to remove Pelletier is found at former 12 *U.S.C.* § 1730. Because Pioneer Savings was a federally insured financial institution, Congress granted to the then FSLIC acting through the FHLBB the right to remove any officer of Pioneer under a procedure which provided due process to the employee affected by the removal.

Nevertheless, it is admitted that no removal action was ever taken by those federal agencies as against Pelletier.

The foregoing authorities were recently *expanded* by the Ninth Circuit, who on September 12, 1991, decided *Meyer vs. Fidelity Savings* (9th Cir. 1991) 944 F.2d 562.[3] *Meyer* concerned a Bivens claim against the FSLIC as a result of a termination of a senior officer of a savings and loan association. *Meyer* came to this Court after a jury trial. *Meyer* is important because it extended the constitutionally protected employment right to employees who were at-will, i.e. did not have a written employment contract such as Pelletier had with Pioneer.

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[3] *Meyer* also resolves adversely to Behrens his assertion that pervasive regulation of the savings and loan industry precludes Pelletier's claims.

The foregoing is the narrow issue which should have been addressed by Behrens in his supplemental brief. However, it is not the issue which is addressed either in the supplemental brief or in any depth in Behrens' underlying briefs. Rather, Behrens attempts to argue that his conduct was reasonable under the circumstances. This is a factual issue which may not be resolved in an interlocutory appeal. It is also an issue which has been resolved against Behrens in the Court below by its October 9, 1991, substitution denial order.

Accordingly, because Behrens is a private party who may not claim qualified immunity and because Behrens does not seek to test whether Pelletier has alleged a violation of a "clearly established right" and because Pelletier has unquestionably alleged a violation of a long established "clearly established right", this Court lacks jurisdiction over Behrens' interlocutory appeal on qualified immunity.

SUBSTITUTION APPEAL

Another issue sought to be raised by Behrens in these appeals is whether the Court below erred in denying his motion to substitute the USA under the Westfall Act. 28 *U.S.C.* § 2679.[4] Pelletier asserts that this Court lacks jurisdiction to decide this issue on an interlocutory appeal. The issue of whether there is any jurisdiction to review

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[4] This is really two appeals in one as Behrens has also filed a Notice of Appeal from the lower Court's October 9, 1991, substitution denial order. This second appeal (No. 92-55023) has been consolidated with the first appeal (No. 89-56265).

by interlocutory appeal a denial of substitution has never been decided by this Court. Pelletier asserts that this Court should not expand such interlocutory appellate jurisdiction. Further, Pelletier asserts that Behrens' appeal seeks a review of factual determinations made by the Court below and that this Court has consistently refused to review factual determinations by interlocutory appeal.

This substitution issue concerns only Pelletier's common law tort claims, certain of which are intentional tort claims. Behrens relies on 28 *U.S.C.* § 2679(d), as revised by Pub. Law 100-694 (the "Westfall Act"). Under the Westfall Act, the Attorney General's designee, which in this case is also Behrens' counsel, may provide a "scope" certification to the effect that in committing the torts alleged, the agent was acting within the course and scope of his agency or employment relationship.

There is very little case authority developed on the Westfall Act. Nevertheless it appears clear that if any employee is acting within the course and scope, then the United States should be substituted in that defendant's place as to all common law torts and thereafter the United States may assert all applicable defenses under the Federal Tort Claims Act. Since many intentional torts are excepted from the Federal Tort Claims Act, substitution usually results in dismissal of those excepted claims. Thus, recovery for those excluded torts will normally only result if the employee/agent is found to have been acting outside or beyond the "scope".

Behrens previously argued to this Court that the mere filing of a "scope" certification by his trial counsel was determinative of this substitution issue. This Court

and most other courts have held to the contrary. In *Meridian Intern. Logistics, Inc. vs. U.S.* (9th Cir. 1991) 939 F.2d 740, 745, this Court held that such a scope certification was subject to *de novo* review by the Court below. There is no reported decision of this Court holding that a denial of such a substitution request by the lower court is immediately appealable.

In *Meridian,* this Court reversed and remanded a lower court's grant of substitution. This Court held that "[w]hether a Government employee was acting within the scope of his employment is a mixed question of law and fact". Normally, this Court only reviews pure questions of law on an interlocutory appeal. Thus, *Meridian* provides no authority to support jurisdiction.

While Behrens cites three decisions from other Circuits to support his claim of immediate appellate jurisdiction, only one of those cases, in fact, provides any support.

Mitchell vs. Carlson (5th Cir. 1990) 896 F.2d 128 provides no support. While *Carlson* did find appellate jurisdiction to review a re-substitution order, that order was effectively a final order in light of the subsequent state court remand order. Moreover, in the Fifth Circuit, the Attorney General's "scope" determination was not then reviewable by the District Court. Thus, *Carlson* is in direct conflict with this Court's *Meridian* decision.

Nasuti vs. Scannell (1st Cir. 1990) 906 F.2d 802 involved a mandamus petition before any consideration was given by the District Court of the "scope" decision. The Circuit Court remanded to the District Court to review the "scope" certification. The direction to the

lower court was to remand the action to state court if the conduct was outside the scope or dismiss the action if the conduct was within the scope. The former order is non-reviewable and the latter is reviewable as a final order. Thus, *Nasuti* is a parallel decision to *Meridian* and provides no guidance to this Court.

The case closest to the point is *Yalkut vs. Gemignani* (2nd Cir. 1989) 873 F.2d 31. This case involved common law tort claims against an IRS revenue agent. The agent moved for summary judgment or, alternatively, dismissal. The lower court's denial was appealed. The Second Circuit considered the matter as a claim for immunity. Of importance is the holding that:

> An interlocutory appeal, however, is available only if the question of immunity does not turn on disputed questions of fact. [Citations omitted.]

Yalkut, at 34.

Thus, it is clear that the issue of interlocutory appellate jurisdiction of a denial of substitution is a matter of first impression in this Court and in most Circuits. At a time when this Court has criticized interlocutory appellate jurisdiction in qualified immunity matters, it seems ill advised for interlocutory appellate jurisdiction to be expanded to substitution issues. Behrens has already sought review in this Court on four occasions noted above. Undoubtedly, when the Court below rules on Behrens' pending summary judgment motion, he will file yet another appeal. Is it really wise to expand jurisdiction to allow Behrens yet another appeal? Nearly every other

appellant before this Court is allowed only one appeal and that is from a final judgment.

Pelletier asserts also that Behrens is attempting by this appeal to seek review of factual findings in the Court below. The lower Court's October 9, 1991, denial of substitution order is a fact based order.

Assuming *arguendo* that a substitution request raises an interlocutory appealable issue similar to an immunity claim, this Court's discussion of its jurisdiction to review immunity issues on interlocutory appeals contained in *Valasquez vs. Senko* (9th Cir. 1987) 813 F.2d 1509 is instructive. Similar to the holding in *Yalkut, supra*, this Court held that an appeal involving a disputed factual issue does not present "a purely legal issue, separable from the merits, as *Mitchell* requires" and dismissed the appeal.

In *Valasquez*, the defendants who were admittedly federal officials, contended that they were entitled to summary judgment because they did not participate in the planning or direction of the raids at issue. They did not claim that the plaintiff had failed to allege a violation of a "clearly established right". This Court dismissed the appeal because the issue was (i) fact based and (ii) inextricably bound up in the underlying claim.

In this case, Pelletier asserts that his constitutionally protected right to employment free of governmental interference was violated by Behrens continuing conduct. Rather, than admitting the conduct as alleged by Pelletier, Behrens asserted in the Court below that his real conduct and motivation was something other than as alleged by Pelletier. Behrens asserts that Pelletier was not really Pioneer's managing officer but merely a designee.

Behrens asserts that Pelletier's written employment agreement was not unconditional but was conditioned upon regulatory approval. Behrens asserts that the Behrens Directive was not a removal directive, but only guidance which Pioneer elected to follow. Finally, Behrens asserts that he was, in fact, given authority to author and deliver the Behrens Directive.

In response to this fact sensitive position which is inextricably wound up on Pelletier's claim, the Court below conducted a factual examination based upon declarations, discovery and exhibits. As a result, the Court below made findings of fact which it stated in its October 9, 1991, order. The findings of fact then led to the lower Court's conclusion of law: "Therefore, Behrens was not acting within the scope of his employment when he ordered Pioneer to remove plaintiff from his position as managing officer."

If this Court should decide to expand its interlocutory appellate jurisdiction in this area, Pelletier respectfully requests that this Court limit any such review to "purely legal issues." Under these circumstances, Pelletier is confident that this Court will nevertheless dismiss Behrens' appeal as it does not raise "purely legal issues" but rather seeks to have this Court conduct its own fact based "scope" examination and disregard the efforts of the Court below which were taken in compliance with this Court's earlier remand order.

PELLETIER SHOULD BE AWARDED ATTORNEYS FEES

Pelletier has been required to spend considerable time in connection with these appeals. In Pelletier's earlier brief, Pelletier requested that this Court award him attorneys fees against Behrens' counsel pursuant to 28 *U.S.C.* § 1927 in the sum of $10,000. As a result of additional time required by this matter, Pelletier raises this request to $15,000. Were Behrens' appeals based upon "purely legal issues", this request would not be made. However, based upon the fact that both appeals improperly attempt to seek review of only factual issues and the fact that Behrens has consistently sought to delay a resolution of this matter on the merits, Pelletier can only conclude that these appeals are a vexatious attempt to harass Pelletier and make it absolutely uneconomic to pursue claims for violation of constitutional rights.

The issues involved in the underlying action are not complex and could easily have been tried and resolved within six months of filing with a minimum of expense to Pelletier. As the matter now stands, Pelletier is not able to try this matter because of these interlocutory appeals and thus is not able to seek compensation for a wrongs which started in May, 1986, and are continuing today.

CONCLUSION

Pelletier asserts that insofar as these two appeals are concerned, this Court lacks subject matter jurisdiction to decide the issues presented by Behrens

With regard to the claim of qualified immunity, the claim is without merit because Behrens was at all relevant

times a private party and not a government employee. Secondly, Behrens' appeal fails to raise the "purely legal issue" of whether Pelletier's complaint alleges a violatic of a "clearly established right" and instead seeks to have this Court resolve disputed factual issues.

With regard to the denial of Behrens' substitution request, jurisdiction is an issue of first impression. Interlocutory appellate jurisdiction should not be expanded. If it is expanded, it should be limited to "purely legal issues". Behrens seeks to have this Court become the trier of fact being dissatisfied with the factual findings of the Court below which led to the inescapable conclusion that Behrens acted beyond the scope of any agency relationship. This Court having previously remanded the matter to the Court below for a determination, should not withhold further review until after a final judgment is rendered.

Behrens has filed two appeals and two stay requests with this Court. He threatens to file a third appeal if his pending summary judgment motion is denied. Throughout the proceedings, Behrens has attempted to bootstrap on a purported claim of qualified immunity to seek interlocutory appellate review of virtually every ruling in the Court below. This Court should put a stop to these tactics, particularly since Behrens was not even a government employee at the time he committed his most grievous torts against Pelletier.

For the foregoing reasons, it is respectfully requested that this Court dismiss both appeals and award Pelletier $15,000 in attorneys fees against Behrens' counsel.

DATED: February 7, 1992

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[Proof Of Service Omitted In Printing]

DEFENDANT/APPELLANT' SUPPLEMENTAL REPLY BRIEF, EOD FEBRUARY 19, 1992

No. 89-56265

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK
OF SAN FRANCISCO, Et. Al.

Defendants,

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

SUPPLEMENTAL REPLY BRIEF FOR FEDERAL APPELLANT BEHRENS

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TABLE OF CONTENTS

Page

COUNTER STATEMENT OF THE FACTS 1

I. PLAINTIFF DOES NOT ADDRESS THE RELEVANT NINTH CIRCUIT CASES ON IMMUNITY APPEALS 4

II. PLAINTIFF'S CLAIM THAT BEHRENS WAS NOT A FEDERAL EMPLOYEE BUT A PRIVATE PARTY IS SIMPLY A RED HERRING 6

III. PLAINTIFF'S ARGUMENT, COMMENCING AT PAGE 11 OF HIS BRIEF, VIOLATES THE COURT'S ORDER ON SUPPLEMENTAL BRIEFING 7

IV. THE REFORM ACT SUBSTITUTION RULING IS AN APPEALABLE ORDER 8

CONCLUSION 10

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

Page

Abney v. United States, 431 U.S. 651 (1977) 9

Anderson v. Creighton, 483 U.S. 635 (1987) 6

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 5, 8, 9

Compania Mexicana De Aviacion v. United States Dist. Court, 859 F.2d 1354 (9th Cir. 1988) 4, 5

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 8

Flanagan v. United States, 465 U.S. 259 (1984) 8

Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991) 4, 6

Helstoski v. Meanor, 422 U.S. 447 (1979) 9

Johnson v. Carter, 939 F.2d 180 (4th Cir. 1991) 10

Lutz v. Secretary of the Air Force, 944 F.2d 1477 (1991) 4,5

Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989) 4

Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990), *aff'd on others grounds*, 112 S. Ct. 358 (1991) 10

Mitchell v. Forsyth, 472 U.S. 11 (1985) 4, 5, 6

Nixon v. Fitzgerald, 457 U.S. 731 (1981) 9

Schlegel v. Bebout, 831 F.2d 881 (9th Cir. 1987) 4, 5

Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980) 6

United States v. Smith, 111 S. Ct. 1180 (1991) 10

Velasquez v. Senko, 813 F.2d 1509 (9th Cir. 1987) 5

REGULATIONS:

12 C.F.R. 501.10 7

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SUPPLEMENTAL REPLY BRIEF FOR FEDERAL APPELLANT BEHRENS

COUNTER STATEMENT OF THE FACTS

We recognize that this Court has confined the supplemental briefs it has ordered to two jurisdictional issues. However, in his supplemental brief, the plaintiff has taken the facts, which are simple and straight-forward, and distorted them to suit his subsequent arguments. We feel obliged to make two factual corrections, in order to aid the Court in its jurisdictional analysis.

A. According to the plaintiff, defendant Behrens, "acting outside his lawful authority and with knowledge and intent that his acts would destroy Pelletier's career in the industry, wrote a letter to the Pioneer Board" "requir[ing] Pioneer to remove Pelletier as its managing officer." (Pl. Supp. Brief at 5).

Plaintiff has erected his entire case upon this one letter. He has urged that the letter required that plaintiff be fired, and that as a result the plaintiff was the victim of common law torts and constitutional torts. He claims in this appeal that the defendant has admitted that he is a private party, and that as a private party he has no immunity from suit – hence no right to an interlocutory appeal.

We note, however, that in a ruling not mentioned by plaintiff, the district court, on October 6, 1989, held that the California one year statute of limitations barred any *Bivens* suit based on the letter that Supervisory Agent Behrens sent to Pioneer, or based upon plaintiff's loss of employment.[1] Thus, the very action that the plaintiff dwells on, and in this Court charges as the principle act of wrongdoing, has been found by the lower court to be time-barred. Since this Court has not been asked by either party to reach the limitations issue (and the Court, in any event, could not reach the issue until final judgment is entered), the sole substantive issue pending on the qualified immunity appeal is whether plaintiff's unsupported allegations of a conspiracy to keep him from finding

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[1] The court also held that certain of plaintiff's tort claims were barred by the statute of limitations.

employment in the financial institutions industry was a sufficient basis on which to deny the defendant's good faith defense of qualified immunity from suit. In other words, while the plaintiff attempts to capture the Court's attention with extravagant claims of wrongdoing arising out of the letter the defendant wrote to Pioneer bank, that letter was not the basis of the lower court's qualified immunity ruling on the motion to dismiss because of the statute of limitations problem.

B. We also take issue with plaintiff's careless and frequent factual assertion that defendant Behrens, by virtue of his letter to Pioneer, "removed" plaintiff Pelletier as president of Pioneer. This constant refrain of the plaintiff is troubling for two reasons.

First, as we have already explained, the district court held that this incident was barred by the statute of limitations. Since the district court did not base its denial of qualified immunity on the letter written to plaintiff by Behrens, and since the statute of limitations issue is not before this Court, plaintiff's dangling of the issue before the Court serves no purpose, except an inflammatory one.

Second, nothing in the record upholds plaintiff's charge that Behrens "removed" Pelletier. All the defendant did, on behalf of the agency, was write a letter to plaintiff's employer, declining to approve or disapprove plaintiff as president of Pioneer until an FSLIC investigation of allegations of his wrongdoing was complete. The defendant did not "remove" plaintiff from his job. The plaintiff's employer, Pioneer, chose to terminate his employment, declining either to put plaintiff in another

position at the bank, or to put his appointment as president on hold, pending the resolution of the investigation of plaintiff. All this is evident from the letter itself, part of the record in the case, and the complaint.

Plaintiff's statement of facts thus serves as a predicate for his subsequent legal arguments; but his factual recitation is misleading.

I.

PLAINTIFF DOES NOT ADDRESS THE RELEVANT NINTH CIRCUIT CASES ON IMMUNITY APPEALS

Plaintiff has declined to acknowledge, let alone address or distinguish, most of the key cases from this Circuit upon which stand for the principle that when a motion to dismiss based on qualified immunity is denied, the case is immediately appealable. Plaintiff does not address *Compania Mexicana De Aviacion v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988), although in that case the Court squarely held that "[a] denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law. The entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost is a case is erroneously permitted to go to trial." Plaintiff's brief also fails to address *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (1991), or *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) – cases clearly supporting our position.

On the sole occasion when the plaintiff actually cites one of our cases, he is forced to concede that the case's

holding rejects his position on appealability. Accordingly, plaintiff refers to *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991), and admits that "[i]n *Fry* this Court held that there is jurisdiction in this Court to hear an interlocutory appeal from a denial of a motion to dismiss." (Pl. Supp. Brief at 9).

Time and again this Court, following the Supreme Court's ruling in *Mitchell v. Forsyth*, 472 U.S. 11 (1985), has held that denials of immunity at the motion to dismiss stage are immediately appealable. In *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987), the Court observed that in *Mitchell* the Supreme Court "held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under *Cohen*." In *Compania Mexicana De Aviacion v. United States Dist. Court*, the Court ruled that "[a] denial of a motion to dismiss based on a claim of absolute or qualified immunity is an appealable interlocutory order to the extent that it turns on an issue of law." In *Schlegel v. Bebout*, 831 F.2d 881 (9th Cir. 1987), the Court held that a denial of a motion to dismiss based on immunity was immediately appealable. In *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (1991), the Court permitted an interlocutory appeal of a denial of *Feres* immunity, analogizing the situation to one where qualified immunity is denied.

For this Court to issue a holding supporting plaintiff's position would be contrary to the law of the Supreme Court and the law of this Circuit. Plaintiff's failure to address most of the key Ninth Circuit cases cited in our brief, and his concession that in *Fry* this Court held that denials of immunity at the motion to

dismiss stage *are appealable* – establish that plaintiff's position on the appealability issue entirely lacks merit.[2]

II.

PLAINTIFF'S CLAIM THAT BEHRENS WAS NOT A FEDERAL EMPLOYEE BUT A PRIVATE PARTY IS SIMPLY A RED HERRING

Plaintiff asserts that defendant Behrens was not acting as a duly appointed agent of the Bank Board, but as a private person, and urges that for this reason Behrens cannot have qualified immunity and there can be no interlocutory appeal. This is difficult to reconcile with plaintiff's concession in his opening merits brief before this Court that "Behrens was appointed an agent of the FHLBB and FSLIC," (Plaintiff's Opening Brief at 6). In any event, the question of Behrens' status is part and parcel of the immunity defense, and a proper issue for the Court to consider on an appeal challenging the denial of qualified immunity. This Court's task on appeal is to

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[2] Plaintiff makes so many misstatements of fact and law in his brief that it is difficult to forgo commenting on them, even given the strict page limitations on briefs set by the Court. Perhaps the most glaring misstatement of law appears at page 13 of Plaintiff's Supplemental Brief. There, in commenting on Behrens immunity defense, plaintiff states that "Behrens attempts to argue that his conduct was reasonable under the circumstances. This is a factual issue which may not be resolved in an interlocutory appeal." If plaintiff is correct that a defendant can not make a reasonableness defense in an interlocutory immunity appeal, then the Supreme Court, this Court, and all other federal courts will have to vacate years of decisions to the contrary. See, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Fry v. Melaragno*, 939 F.2d 832, 838 (9th Cir. 1991).

determine "whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. at 528 n.9. This Court's review of the immunity issue is *de novo*, and encompasses the question whether the defendant was acting as a federal agent.

The question whether an individual is an employee of the federal government is a matter of federal law. See *Slagle v. United States*, 612 F.2d 1157, 1160 (9th Cir. 1980). The record here indicates that Behrens was a properly appointed Supervisory Agent. Board regulations state that "officers and employees of a Federal Home Loan Bank, when designated by the Principal Supervisory Agent shall be the agent of the Board and the Federal Savings and Loan Insurance Corporation." 12 C.F.R. 501.10. Bank Board Resolution No. 84-126, (R.E. 19) formally appointed Behrens a Supervisory Agent of the Board. We are at a loss to understand how in these circumstances the plaintiff can continue to argue that Behrens was not a federal employee and not entitled to assert qualified immunity.[3]

---

[3] One possible answer to this question is that the plaintiff has confused the question whether Behrens was a federal employee with whether Behrens acted within the scope of his employment. For example, at page 12 of Plaintiff's Supplemental Brief, in the Heart of his argument that Behrens is not a federal employee, plaintiff claims that "Nothing in the regulations or the FHLBB resolution permitted Behrens to remove a thrift official from his job." This statement, in the section of plaintiff's brief dealing with whether Behrens was a federal employee, addresses the quite distinct question whether Behrens was acting within the scope of his employment.

III.

PLAINTIFF'S ARGUMENT, COMMENCING AT PAGE 11 OF HIS BRIEF, VIOLATES THE COURT'S ORDER ON SUPPLEMENTAL BRIEFING

Plaintiff begins this argument by stating that "[t]he bulk of Behrens' supplemental brief is directed to authorities which permit a government employee to take an interlocutory appeal. Behrens' supplemental brief is strangely silent on the issues raised by Behrens in his appeal. The reason is that Behrens essentially concedes that Pelletier has alleged a violation of a "clearly established right." (Pl. Supp. Brief at 11). This kind of rhetoric brings no honor to plaintiff's cause. The reason our supplemental brief was silent on the substantive issues is obvious: this Court did not ask for briefs on those substantive issues, but for briefs on the appealability issues alone.

Plaintiff himself, however, next goes on to argue the substantive issues. On pages 11-14 of his brief, plaintiff addresses matters that go to whether the letter Behrens wrote Pioneer Savings & Loan deprived Pelletier of a property right. This substantive argument is not within the parameters of the Court's order regarding supplemental briefs. Indeed, as noted, these are matters that would not properly be before the Court (because of the statute of limitations problem) even if this Court had required supplemental briefing on the substantive issues.

Accordingly, all of plaintiff's allegations in this section of the argument (pages 11-14) are not in accordance with the Court's briefing order, and the section should be struck.

IV.

THE REFORM ACT SUBSTITUTION RULING IS AN APPEALABLE ORDER

A. Denial of substitution under the Reform Act is immediately appealable under the *Cohen* collateral order doctrine. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court held that in certain classes of cases, allowing an appeal from an interlocutory order comports with the purposes of the final judgment rule. The *Cohen* test has been framed as one involving three factors –

> First, [a trial court] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." [*Flanagan v. United States*, 465 U.S. 259 (1984) quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)]

The first prong – the requirement that the trial court order "must conclusively determine the disputed question" – ensures that the matter is ripe for appeal. This prong is easily met here, for the district court, on limited remand from this court, entered an order denying the government's motion for substitution under the Reform Act.

The third prong requires that the trial court order must "be effectively unreviewable on appeal from a final judgment" – ensuring that there is a practical reason for allowing an appeal before entry of final judgment. Here, it is abundantly clear that the district court's decision involves an important right that would be lost irreparably

if review had to await final judgment. Absent an immediate appeal, the individual defendant would have to endure discovery and trial, and would lose the absolute immunity granted by the Reform Act. Even if an appellate court ultimately ruled that denial of substitution was improper, this help would arrive too late, for the defendant would have already lost his entitlement not to stand trial or bear the burdens of pre-trial.

Finally, the appeal is separate and collateral, in the sense that it seeks to vindicate a special immunity from trial analogous to immunities asserted in *Nixon v. Fitzgerald*, 457 U.S. 731 (1981) (absolute immunity from trial for damages); *Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy immunity from second trial); and *Helstoski v. Meanor*, 422 U.S. 447 (1979) (Congressman's immunity from trial for damages). Consequently, defendant's appeal satisfies the second prong of the *Cohen* formula as well.

B. The above-analysis, of course, reinvents the wheel. The Supreme Court has already held, in *Nixon v. Fitzgerald*, that denials of absolute immunity are appealable interlocutory orders, and should be heard by an appellate court at the earliest possible stage. The Court has also held that "[t]he Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall.*" *United States v. Smith*, 111 S. Ct. 1180, 1183 (1991). Accord: *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *aff'd on other grounds*, 112 S.Ct. 358 (1991); *Johnson v. Carter*, 939 F.2d 180, 183 n.4 (4th Cir. 1991).

Since the Reform Act, by its substitution requirement, confers an absolute immunity on individual defendants,

and since denials of absolute immunity are immediately appealable, it follows that the order in this case, which denies substitution, is properly before the Court on an interlocutory appeal.

CONCLUSION

For the foregoing reasons, and the reasons stated in the appellant's opening brief and reply brief, and opening supplemental brief, the orders of the district court on qualified immunity and substitution should be reversed.[4]

Respectfully submitted,

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FEBRUARY 1992

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[4] Plaintiff is obviously not entitled to an award of attorney's fees; at the very least, the positions put forward by the Department of Justice, as counsel for Behrens, are substantially justified.

DEFENDANT/APPELLANT'S PETITION FOR PANEL REHEARING, EOD AUGUST 12, 1992

Nos. 89-56265, 92-55023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR PANEL REHEARING

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TABLE OF CONTENTS

	Page
ISSUES MERITING REHEARING	1
COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE	2
ARGUMENT	6
I. THE PANEL ERRED BY FAILING TO APPLY THE HOLDING OF *SIEGERT V. GILLEY*	6
II. THE PANEL SHOULD VACATE ITS DICTUM WHICH PURPORTS TO RESTRICT DEFENDANTS TO ONE PRE-TRIAL IMMUNITY APPEAL	8

TABLE OF AUTHORITIES

Cases:

	Page
Abel v. Miller, 904 F.2d 394 (7th Cir. 1990)	10
Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)	1, 8, 9
Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied sub nom.*, Hanton v. Kennedy, 479 U.S. 1103 (1987)	9
Miree v. Dekalb County, 433 U.S. 25 (1977)	7

Mitchell v. Forsyth, 472 U.S. 511 (1984) 9
Richards v. Harper, 864 F.2d 85 (9th Cir. 1988)..... 8
Schmidt v. Herrmann, 614 F.2d 1221 (9th Cir. 1980) 8
Siegert v. Gilley, 111 S. Ct. 1789 (1991).....1, 6, 7, 10
Sinclair v. Schriber, 834 F.2d 103 (6th Cir. 1987) 9

Statutes:

Federal Employees Liability Reform and Tort Compensation Act of 1988.....3, 4

IN THE UNITED STATES COURT OF APPEALS
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Nos. 89-56265, 92-55023

ROBERT J. PELLETIER,

Plaintiff-Appellee,

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, Et. Al.,

Defendants

and

JOHN W. BEHRENS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR PANEL REHEARING

ISSUES MERITING REHEARING

1. Whether the panel erred by not considering the effect of *Siegert v. Gilley,* 111 S. Ct. 1789 (1991) upon plaintiff's claim that the defendant violated clearly established law.

2. Whether the panel should vacate *dictum* in its decision which purports to establish a new rule for the Ninth Circuit limiting a federal or state defendant to one pre-trial immunity appeal. The panel's language conflicts, *inter alia,* with the Ninth Circuit's earlier decision in *Fry v. Melaragno,* 939 F.2d 832, 835 n. 5 (9th Cir. 1991).

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

A. The defendant, John W. Behrens, was a duly-designated Supervisory Agent of the Federal Home Loan Bank Board (now part of the Office of Thrift Supervision) and the FSLIC. The plaintiff, Robert J. Pelletier, was the president-designate of Pioneer Savings & Loan Association.

Pioneer was required by law to obtain approval of its new president-designate from Supervisory Agent Behrens. This approval was not forthcoming. An FSLIC investigation of the Beverly Hills Savings & Loan Association, where Pelletier had previously been employed as a loan officer and head of the bank's Major Loan Division, turned up wrongdoing at that bank, problems so serious that Agent Behrens on behalf of the Bank Board sent a letter to Pioneer advising that because of the ongoing FSLIC investigation, "this office is unable at this time

to proceed with the application [seeking approval of Pelletier as president]." Further, Behrens advised, "we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Saving is complete." The letter was on Board stationery and signed by Behrens as "Supervisory Agent" of Pioneer.

Pelletier was subsequently asked by Pioneer to step down as President. He refused. He was then fired by Pioneer.

B. This lawsuit was brought by Pelletier to challenge his dismissal by Pioneer. Named as defendants were the Federal Home Loan Bank of San Francisco, the Bank Board, the United States and Behrens. Counts one and two of the complaint sought damages and equitable relief based upon an alleged deprivation of Pelletier's procedural and substantive due process rights. Other counts were founded upon the APA, the Privacy Act and common law tort theories.

The United States filed an omnibus motion to dismiss, or in the alternative for summary judgment, seeking substitution of the United States for Behrens, insofar as common law torts were alleged, a requirement of the then recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988; dismissal of all other claims; and in any event, a grant of qualified immunity for Behrens.

The district court granted the motion in part. The court dismissed the APA and Privacy Act damage claims against Behrens, and held that the one year state statute

of limitations on *Bivens* claims barred a *Bivens* claim based on the Behrens letter to Pioneer or the act of dismissal itself. The court also held that California's one year statute of limitations barred certain acts alleged to be common law torts. However, the court declined to dismiss the *Bivens* claim, to the extent it rested on acts that were not time-barred – even though no specific acts were alleged. The court also appeared to deny substitution of the United States as defendant on the remaining common law tort counts; and the court denied Behrens qualified immunity.

C. An appeal taken to this Court raised three issues: (1) whether, to the extent the complaint alleged the commission of common law torts, the district court erred by failing to substitute the United States for the individual defendant, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988; (2) whether the special factor of Congress' comprehensive regulation of the thrift industry barred plaintiff's *Bivens* action; (3) whether Behren's motion for qualified immunity should have been granted by the district court.

D. On May 2, 1991, after oral argument, the Court remanded the case to the United States District Court for the Central District of California "for the limited purpose of enabling the district court to advise us if a ruling [on the substitution issue] has been made, and if so, the nature of its ruling."

E. On October 8, 1991, the lower court held that the federal defendant was not acting with the scope of his employment at the time the alleged acts occurred, and that therefore, there could be no substitution of the

United States as defendant under the Reform Act. The district court then set a trial date for plaintiff's claims against the United States and his *Bivens* and common law tort claims against Behrens. After the district court refused to grant a stay pending appeal, a stay was granted by this Court.

F. On January 6, 1992, the Court ordered that the appeal be reinstated.[1] On June 29, 1992, the panel issued its decision on the merits. The panel found that it had jurisdiction over both immunity issues under the *Cohen* collateral order doctrine, and ordered the district court to substitute the United States as defendant on the common law tort counts, as required by the express provisions of the Reform Act.

However, while finding jurisdiction to hear the qualified immunity appeal, the panel, in *dictum*, announced that henceforth, in the Ninth Circuit, one interlocutory appeal, taken either at the motion to dismiss or summary judgment stage, is "all that a government official is entitled to and all that we will entertain." Slip op. at 7476. Thus, "if the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril." *Id.*

---

[1] The court also ordered the filing of supplemental briefs on two issues: whether denial of a motion to dismiss based on qualified immunity "is immediately appealable in this circuit" and whether denial of a motion to substitute is immediately appealable. *No supplemental briefing was ordered on the precise issue presented here, and hence the court's reasoning was without the benefit of briefs from the parties.*

The panel then ruled that although the complaint "raises at most nebulous theories of conspiracy * * * that in their current form would be insufficient to survive a motion for summary judgment," the complaint was nonetheless adequate to survive a motion to dismiss. Slip op. 7479-7480.

Moreover, without even mentioning *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), the panel held that, because plaintiff alleged that as a result of the defendant's actions he had been unable to find work in the financial industry, plaintiff had stated a claim for deprivation of a liberty interest.

ARGUMENT

I. THE PANEL ERRED BY FAILING TO APPLY THE HOLDING OF *SIEGERT V. GILLEY*

We respectfully submit that the panel erred when it decided that there was a sustainable charge of a Fifth Amendment violation here, without making any reference to the Supreme Court's seminal decision on this very issue in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991). *Siegert* controls the outcome of this case.

A. In *Siegert v. Gilley*, a clinical psychologist was informed that his employer, a federal hospital, was about to terminate him. Accordingly, he resigned. Later, in a lawsuit, the psychologist urged that a letter subsequently written to a prospective employer by the hospital defamed him, caused him to lose employment, and prevented him from obtaining future employment in his field. While Siegert charged a violation of his Fifth

Amendment liberty interests, and sought damages under a *Bivens* theory, the Supreme Court rejected his plea. The Court held that:

> The statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects * * * But so long as such damage flows from injury caused by the defendent to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action. [111 S.Ct. at 1794]

B. The facts of *Siegert* are directly on point here, and the result here should thus be the same as in *Siegert*. Pelletier urges that because of a letter written by Behrens, Pelletier has been unable to find employment in the financial industry. He seeks damages under *Bivens*, premised on this injury to his "liberty." But the *Siegert* court made it clear that such damages, while recoverable under state tort law, are not recoverable under *Bivens*, for no liberty interest is implicated. The panel was thus wrong when it held that plaintiff's complaint stated sufficient facts, when under the motion to dismiss standards, to make out a claim for a due process "liberty" violation. *Siegert* holds that even assuming the facts of Pelletier's complaint to be true, the facts alleged to not rise to the level of a constitutional violation.

The panel clearly failed to consider the holding of the Supreme Court in *Siegert*; for this reason we request that the panel grant rehearing and reconsider the immunity

issue under the guidelines provided by the Supreme Court.[2]

II. THE PANEL SHOULD VACATE ITS DICTUM WHICH PURPORTS TO RESTRICT DEFENDANTS TO ONE PRE-TRIAL IMMUNITY APPEAL

A. The panel's decision contains two pages of discussion proposing a new Ninth Circuit rule limiting governmental defendants to one pre-trial immunity appeal. The discussion is *dictum*. The issue of how many pre-trial appeals a litigant claiming immunity may take was not squarely presented in the case, was never briefed, and was not a subject of discussion at oral argument. We,

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[2] The panel's error, we note, was exacerbated by the standards it employed in assessing the plaintiff's complaint. The panel stated that on a motion to dismiss the court must accept the allegations as true "in their entirety." Actually, the panel was only obliged to accept as true those factual allegations that were well-pled. See, *Miree v. Dekalb County*, 433 U.S. 25, 27 n.2 (1977). Moreover, as this Court has recognized, a pleading which does not present "a short, plain statement respecting the alleged wrongdoings of each [defendant]" satisfies neither the letter nor the spirit of the notice pleading requirements of Rule 8. *Schmidt v. Herrmann*, 614 F.2d 1221, 1223 (9th Cir. 1980). Indeed, even under the liberal standard applicable to actions filed *pro se*, vague and conclusory allegations, such as those raised by the plaintiff, are insufficient to avoid dismissal. In *Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988), the Court held that dismissal of a *pro se* civil rights complaint was proper where the complaint "lacked specific factual allegations showing the defendants' participation in the alleged discriminatory practice"; the court remarked that "we do not supply essential elements of a claim that were not initially pled."

therefore, respectfully request that the language purporting to limit the number of pre-trial immunity appeals be vacated.

B. In this regard we note that the panel's *dictum* on pretrial immunity appeals conflicts with the Ninth Circuit's earlier decision in *Fry v. Melaragno*, 939 F.2d 832, 835 n. 5 (9th Cir. 1991).[3] In *Fry*, the Ninth Circuit addressed the immunity issue at the motion to dismiss stage because, "given that a claim of absolute immunity could be interposed again on a motion for summary judgment, judicial economy favors the resolution of this legal issue now, rather than on a subsequent interlocutory appeal." 937 F.2d at 835 n. 5. The *Fry* court observed that "because *Mitchell* [v. *Forsyth*] contemplates that immunity may be raised before trial on both a motion to dismiss and for summary judgment, 'it is possible that the progress of civil rights actions * * * may be interrupted by not one but two interlocutory appeals' " (citation omitted). The panel's *dictum* in this case, limiting a litigant to one pre-trial immunity appeal, cannot be reconciled with *Fry*.

Nor can the panel's *dictum* be reconciled with decisions of sister circuits, or decisions of the Supreme Court. In *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1984), the Supreme Court expressly held that "[t]he denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets [the

---

[3] While an intra-circuit conflict would normally justify reconsideration by the Court *en banc* under Rule 35-1, the discussion is *dictum*, and not appropriate for *en banc* review.

appealability requirements of *Cohen*]." *Mitchell* thus sanctions appeals at both pre-trial stages.

In *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied sub nom., Hanton v. Kennedy*, 479 U.S. 1103 (1987), the Sixth Circuit held that *Mitchell* contemplates "two stages at which the doctrine of immunity may be interposed in advance of trial," and observed that immunity litigation "may be interrupted by not one, but two interlocutory appeals," 797 F.2d at 299. The Sixth Circuit reaffirmed this holding in *Sinclair v. Schriber*, 834 F.2d 103, 105 (6th Cir. 1987): "*Mitchell v. Forsyth* has permitted two bites of the appellate apple, at the pleading and discovery stage." But see, *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990) (limiting immunity appeals).

C. Given that the panel's language is *dictum*, and that it cannot be reconciled with decisions of the Ninth Circuit, other federal courts of appeals, or the Supreme Court, vacation of the parts of the panel decision addressing this issue would be proper. Subsequent problems involving erroneous reliance on this *dictum* (thereby causing litigants to forego immunity appeals sanctioned by the Supreme Court), or problems engendered by a litigant's refusal to follow this purported new rule (because it is not a holding, but merely an advisory opinion) can be avoided by a panel decision to delete the offending language.

We urge the panel to delete this language, which is advisory only, not necessary to the decision in this case, and not binding precedent in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted. The *Siegert* issue should be reconsidered, and the language governing how many pre-trial immunity appeals a litigant may take should be struck from the panel's opinion.

Respectfully submitted,

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AUGUST 1992

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COURT OF APPEALS' ORDER DENYING REHEARING, EOD SEPTEMBER 24, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, v. FEDERAL HOME LOAN BANK BANK OF SAN FRANCISCO, et al., Defendants, and JOHN W. BEHRENS, Defendant-Appellant.	No. 89-56265 D.C. No. CV-89-0969-RMT ORDER (Filed Sep. 24, 1993)

Before: SCHROEDER and REINHARDT, Circuit Judges, and KING, Senior District Court Judge*

The petition for rehearing was misplaced and received by the panel only recently. The panel has voted to DENY the petition for rehearing.

* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

DEFENDANT'S MEMORANDA IN SUPPORT OF SUMMARY JUDGMENT, EOD MARCH 1, 1994

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ROBERT J. PELLETIER,

Plaintiff,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA,

Defendants.

AND RELATED CLAIMS

Civil No.
CV 89-0969-RMT(Tx)

MEMORANDUM IN SUPPORT OF DEFENDANT JOHN W. BEHRENS' MOTION FOR SUMMARY JUDGMENT

Date: March 28, 1994
Time: 9:30 a.m.
Place: Courtroom of the Honorable Robert M. Takasugi
Pretrial: April 18, 1994
Trial: May 10, 1994

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction	1
Statement of Facts	2
Argument	3
I. Plaintiff Was Not Deprived Of A Liberty Interest	3
II. Plaintiff Did Not Have A Property Interest In His Employment	8
III. Plaintiff Has Not Stated A Claim For Denial Of Substantive Due Process	11
IV. Defendant Behrens Is Entitled To Qualified Immunity	12
V. Special Factors Counsel Hesitation In Implying A Bivens Remedy	15
Conclusion	20

TABLE OF CASES AND AUTHORITIES

CASES	Page
ACT UP!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993)	12, 13
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619 S. Ct. 1999 (1971)	15

Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) 9

Bollow v. Fed. Reserve Bank, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 71 L. Ed. 2d 662, 102 S. Ct. 1449 (1982) 6, 11

Botefur v. City of Eagle Point, 7 F.3d 152 (9th Cir. 1993) 8

Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983) 16

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) 8

Codd v. Velger, 429 U.S. 624, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977) 3, 4, 6

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989) 13, 14

Conolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986) 11

Dorr v. County of Butte, 795 F.2d 875 (9th Cir. 1986) 8

Fed. Deposit Ins. Corp. v. Henderson, 940 F.2d 465 (9th Cir. 1991) 4, 5, 6, 8, 11, 12

Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961, 99 L. Ed. 2d 425, 108 S. Ct. 1225 (1988) 6

Gallagher v. Hamilton Standard Fed. Credit Union, No. 93CV1118 (D. Conn. Nov. 11, 1993) 14

Hemphill v. Kincheloe, 987 F.2d 589 (9th Cir. 1993) 13

Hunter v. Bryant, ___ U.S. ___, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991) 12, 13

Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 124 L. Ed. 2d 248, 113 S. Ct. 2337 (1993) 6, 9, 11

Kotarski v. Cooper, 866 F.2d 311 (9th Cir. 1989) 16

Lebbos v. Judges of Super. Ct., Santa Clara County, 883 F.2d 810 (9th Cir. 1989) 12

Mahoney v. Kesery, 976 F.2d 1054 (7th Cir. 1992) 8

Mann v. Carver, 644 F. Supp. 129 (E.D. Mo. 1986) 14

Meyer v. Fidelity Sav., 944 F.2d 562 (9th Cir. 1991), *reversed on other grounds sub nom. Fed. Deposit Ins. Corp. v. Meyer*, No. 92-741 (U.S. Feb. 23, 1994) 14

Mitchell v. Forsyth, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 322 (1985) 12

Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) 3, 8

Pelletier v. Fed. Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) ... 1, 2, 3, 5, 6, 12, 14, 15

Pereira v. U.S. Postal Service, 964 F.2d 873 (9th Cir. 1992) 16

Pipkin v. United States Postal Serv., 951 F.2d 272 (10th Cir. 1991) 16

Roth v. Veteran's Admin. of Govt. of the U.S., 856 F.2d 1401 (9th Cir. 1988) 3

Schweiker v. Chilicky, 487 U.S. 412, 101 L. Ed. 2d 370, 108 S. Ct. 2406 (1988) 15

Siegert v. Gilley, ___ U.S. ___, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) 7, 8, 13

Sky Ad v. McClure, 951 F.2d 1146 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 26, 113 S. Ct. 58 (1992) 15, 17

STATUTES

5 U.S.C. § 706(2)(B) 16

12 U.S.C. § 1726(c) (repealed 1989) 10, 17, 18, 20

12 U.S.C. § 1730(g) (repealed 1989) 8, 16, 20

12 U.S.C. § 1730(g)(1) 19

12 U.S.C. § 1730(g)(2) 19

12 U.S.C. § 1730(g)(6) 19

12 U.S.C. § 1730(h) 19, 20

12 U.S.C. § 1730(h)(2) 19

12 U.S.C. § 1730(q) 18, 19, 20

12 U.S.C. § 1730(q)(B)(i) 19

12 U.S.C. § 1730I(q)(B)(ii) 19

12 U.S.C. § 1730(q)(4) 19

12 U.S.C. § 1730(q)(5) 19

12 U.S.C. § 1730(q)(6) 19

12 U.S.C. § 1831i 18, 20

42 U.S.C. § 1983 8

Financial Institutions Reform, Recovery and Enforcement Act of 1989, P.L. No. 101-73, 103 Stat. 183 (1989) 10, 17, 18

REGULATIONS

12 C.F.R. § 571.6 16

12 C.F.R. § 571.6(b) 18

12 C.F.R. § 571.6(b)2(i) 10, 16, 18

INTRODUCTION

Plaintiff's claims arise from a confidential letter sent by defendant Behrens in response to a request by the Board of Directors of Pioneer Savings and Loan that the Federal Home Loan Bank Board (FHLBB) approve the employment of plaintiff as president of the institution. The letter stated that an inquiry was being conducted into the failure of Beverly Hills Savings and Loan (BHSL), and that because of plaintiff's prior employment with BHSL "this office is unable at this time to proceed with the application until that inquiry is complete." Mr. Behrens filed a motion to dismiss and a notice of substitution of the United States on the common law tort claims. This Court dismissed as time-barred plaintiff's constitutional[1] and common law claims premised upon the sending of a letter but denied the remainder of the motion without prejudice, finding that discovery was necessary to resolve the issues.

An appeal was taken by defendant Behrens. The issues on appeal were whether the Court erred by failing to substitute the United States on the common law claims and by denying Mr. Behrens' motion to dismiss based on qualified immunity. The Court of Appeals found that substitution of the United States was proper because Behrens had acted within the scope of his employment but affirmed the denial of the motion to dismiss. The case was remanded and a status conference held at which the

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[1] Defendant Behrens later stipulated to reopen the time-barred constitutional claims, based upon the suggestion of the court in *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 868 n.6 (9th Cir. 1992).

Court ordered that additional dispositive motions be filed by March 1, 1994.[2]

STATEMENT OF FACTS

From March 18, 1985, to May 9, 1986, plaintiff served as president of Pioneer Savings and Loan. *Pelletier*, 968 F.2d at 867. He had formerly been employed by Beverly Hills Savings and Loan (BHSL), where he was a member of the Senior Loan Committee. An investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the operations of BHSL revealed problems so severe that BHSL was placed in receivership. A continuing investigation by the FSLIC raised questions about the Senior Loan Committee. *Id.*, First Amended Complaint (hereinafter "Complaint"), ¶¶ 9-13, 19.

On March 29, 1984, Pioneer received its insurance of accounts, subject to the condition that it obtain the approval of the FHLBB for any president it might employ during its first three full years of operation. *Pelletier*, 968 F.2d at 867. In May, 1985, plaintiff entered into an employment agreement with Pioneer, with an effective date of March 18, 1985. Employment Agreement, Exhibit A; Previously Lodged Deposition of Robert Pelletier, Vol. 4, p. 496, Exhibit B. That agreement was expressly conditioned upon the approval of Pioneer's Board of Directors. Exhibit A. On May 9, 1985, Pioneer's Board passed a

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[2] In particular, the Court requested that defendant Behrens update his motion for summary judgment filed on July 2, 1991. The present motion supersedes and replaces that prior motion.

resolution approving the agreement, subject to the condition that the agreement also be approved by the FHLBB and state regulators. Minutes of Board of Directors Meeting, Exhibit C. On May 13, 1985, Pioneer submitted the agreement to the FHLBB for approval. Letter of Mark Glahn, Exhibit A. In April, 1986, defendant Behrens was assigned responsibility for supervising the operations of Pioneer. *Pelletier*, 968 F.2d at 868. On May 8, 1986, he sent a confidential letter to Pioneer's Board of Directors stating that because of the ongoing investigation of BHSL no action could be taken on Pioneer's application for approval of plaintiff. Exhibit D. After receiving the letter, Pioneer requested plaintiff's resignation. When he refused, his employment was terminated by Pioneer. *Id.*

ARGUMENT

I. PLAINTIFF WAS NOT DEPRIVED OF A LIBERTY INTEREST.

Plaintiff contends that he was deprived of a liberty interest without due process. It is clear, however, that plaintiff cannot sustain any such claim based upon defendant Behrens' having sent the confidential letter. In *Paul v. Davis*, 424 U.S. 693, 703 (1976), the Court held that an injury to reputation alone violates no constitutional right. Instead, to establish that a liberty interest has been infringed, plaintiff must show that he suffered a tangible loss of a previously recognized right or status as a result of a charge made by the government that seriously damaged his standing and associations in the community. *Roth v. Veteran's Admin. of Govt. of the U.S.*, 856 F.2d 1401, 1410 (9th Cir. 1988). Thus, no deprivation of a liberty

interest occurs unless the government "creates and disseminates a false and defamatory impression about the employee in connection with his termination." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (per curiam). Under this rule, plaintiff must show that the letter states facts which are untrue, that defendant Behrens publicized those facts, and that the assertions were made in connection with the termination of plaintiff's employment. *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991).

Plaintiff's liberty interest claim is completely without basis. First, he cannot dispute the truth of any fact asserted in the letter. The hearing required when an individual "has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' " *Codd*, 429 U.S. at 627. The purpose of such a hearing is not to determine whether, if the charges were true, the individual was properly discharged. *Id.* at 628. Indeed, the "adequacy or even the existence of reasons" for terminating an individual's employment "presents no federal constitutional question." *Id.* Only if a plaintiff challenges "the substantial truth of the material in question" is a hearing required. If he does not, a name-clearing hearing serves no useful purpose. *Id.*

Therefore, that plaintiff contests the wisdom of awaiting the outcome of the investigation before processing the application for approval, or challenges the conclusion that it was appropriate for him to step aside and for Pioneer to seek a new president, is simply irrelevant. The hearing contemplated by *Codd*, is not concerned with whether there was an adequate basis for suggesting that plaintiff step down. Instead, the only purpose of such a

hearing would be to allow plaintiff to take issue with the truthfulness of the facts set out in the letter. Unless plaintiff can identify a factual statement in the letter which he disputes and which has significant bearing on his reputation, he is not entitled to a name-clearing hearing. *Id.*

It is undisputed that Pioneer applied to the FHLBB for approval of the employment of plaintiff as managing officer. *Pelletier*, 968 F.2d at 868; Complaint, ¶ 18; Exhibit A. It also undisputed that the FSLIC was conducting an investigation of BHSL, (968 F.2d at 868, Complaint, ¶ 19), and that plaintiff had formerly been employed with that institution. 968 F.2d at 868; Complaint, ¶¶ 9-13. These are the sole facts set out in the letter. Plaintiff cannot challenge the truth of these facts. Consequently, he cannot meet his burden of showing that he was deprived of a liberty interest.

Moreover, even if plaintiff could show that any fact in the letter is untrue, his claim fails because the letter was not publicized by defendant Behrens. To the contrary, the letter bore the heading "CONFIDENTIAL" and was addressed and delivered solely to the Board of Directors of Pioneer.[3] *See* Exhibit D. Mr. Behrens denies having

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[3] Communicating in this manner with Pioneer was, of course, entirely proper because Pioneer made the application for approval. In *Henderson*, 940 F.2d at 477-478, the president of a state-chartered bank was terminated from his employment after state regulators told the bank's Board of Directors that they should ask for his resignation because of unsatisfactory management practices. The court found that because the individual defendant made the charges only to the Bank's Board of Directors and was not responsible for releasing any damaging information to the public, plaintiff had not established the deprivation of any liberty interest. *Id.*

published this letter to anyone else at any time, declaration of John W. Behrens, Exhibit E, and plaintiff has testified that he has no evidence to the contrary.[4] Exhibit B (deposition of Pelletier, Vol. 2, pp. 176-80, Vol. 3, pp. 352-54, 393-398).

The absence of any action taken by Mr. Behrens subsequent to the sending of the letter is also fatal to plaintiff's claims of ongoing interference with his efforts to obtain employment. The Court of Appeals found that plaintiff's general allegations of concerted action by the defendants directed at preventing plaintiff from securing employment and at destroying his reputation supported the inference (for purposes of a motion to dismiss) that "a cause and effect relationship existed between conduct on Behrens' part and the withdrawal of particular job offers." 968 F.2d at 872. However, the court also found

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[4] It is not sufficient for plaintiff to claim that he is himself compelled to reveal the basis for his termination to potential employers. Plaintiff's own conduct cannot give rise to a constitutional claim against defendant Behrens. A liberty interest is implicated only when the governmental defendant "**creates** and **disseminates** a false and defamatory impression" about an individual in connection with his termination from employment. *Codd v. Velger*, 429 U.S. at 628 (emphasis added). *See also Bollow v. Fed. Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (when reasons are not published, inferences drawn from the fact of termination are insufficient to implicate liberty interests); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Henderson*, 940 F.2d at 477-478 (no deprivation of liberty occurs when statements are not publicly disclosed by the defendant, even though disclosed by others); *Hyland v. Wonder*, 972 F.2d 1129, 1142 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337 (1993) (no deprivation of liberty occurs where statements are not publicly disclosed).

that "Pelletier's complaint raises at most nebulous theories of conspiracy, and that those theories in their current form would be insufficient to survive a motion for summary judgment." *Id.* The Court of Appeals clearly contemplated that plaintiff would produce evidence of specific acts by defendant Behrens beyond the mere sending of the letter. The record, however, is bare of any such evidence.

In any event, the Supreme Court's decision in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), casts significant doubt upon the occupational liberty theory relied on by plaintiff. In *Siegert*, the Court rejected claims remarkably similar to those raised by plaintiff here. Siegert resigned from his position at a federal hospital to avoid being terminated for cause. He obtained new federal employment, but that employment was conditioned upon obtaining "credentials". In connection with Siegert's request for credentials, his former supervisor sent a letter stating that Siegert was "both inept and unethical, perhaps the least trustworthy individual I have supervised." *Id.* at 1791. As a result, Siegert was denied the credentials necessary to keep his job. He sought a position with another hospital but was turned down. Ultimately, his federal employment was terminated. *Id.*

Siegert alleged that the letter caused him to lose his government employment and that because of it he could not find comparable work. The Court rejected his claims, holding that he had shown nothing more than an injury to reputation which was not entitled to constitutional protection. *Id.* at 1794. The Court recognized that "the statements contained in the letter would undoubtedly damage the reputation of one in his position and impair

his future employment prospects," but held that "so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action." *Id.* Under this rule, plaintiff's assertions that jobs have been offered but withdrawn because of the letter and that he has been foreclosed from other employment raise no claim of constitutional dimension.[5]

II. PLAINTIFF DID NOT HAVE A PROPERTY INTEREST IN HIS EMPLOYMENT.

Plaintiff contends that he was deprived of a property interest in his employment by the May 8 letter and asserts that he should have been permitted a hearing under 12 U.S.C. § 1730(g) (repealed 1989) prior to being terminated by Pioneer. The apparent basis for plaintiff's claim is an

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[5] In *Botefur v. City of Eagle Point*, 7 F.3d 152, 158 (9th Cir. 1993), the court, relying on *Siegert*, held that a claim that false statements made by a governmental defendant impaired the plaintiff's liberty interest in pursuing future employment in his chosen profession could not survive because "the alleged defamatory statements were made, if at all, after [plaintiff] resigned." Similarly, in *Mahoney v. Kesery*, 976 F.2d 1054, 1060-61 (7th Cir. 1992), the court recognized that *Siegert* can be "read to suggest that no consequence, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort. If this is right, the 'occupational liberty' rationale that we have developed to make sense of the dispensation which *Paul v. Davis* allowed for some defamations to remain actionable under section 1983 may be out the window and the withdrawal of that dispensation itself imminent."

"Employment Agreement"[6] dated March 18, 1985.[7] (Exhibit A.) The opening paragraph of the document states that "**[u]pon approval of Employer's Board of Directors**, this agreement is entered into. . . . " The minutes from Pioneer's Board of Directors meeting held on May 9, 1985, establish that the Board voted to approve the agreement but only "**subject to the approval of the Employment Agreement by the California Savings and Loan Commissioner (the 'Commissioner') and the Federal Home Loan Bank Board.**" Exhibit C at 78. In other words, Pioneer's acceptance of the agreement was expressly conditioned upon the receipt of approval of that agreement from federal and state regulators.

Property interests are not created by the Constitution. "Rather, they are created and their dimensions defined by existing rules or understandings that stem from state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A "unilateral expectation" of continued employment receives no constitutional protection. Instead,

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[6] Section 1730(g), standing alone, cannot form the basis for any claimed property interest because "[t]he categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). *See also Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir. 1986); *Henderson*, 940 F.2d at 475.

[7] The document was actually signed in May, 1985. Deposition of Pelletier, Vol. 4, p. 496 (Exhibit B).

plaintiff must establish a "legitimate claim of entitlement." *Id.* Clearly, he cannot prove such an entitlement. By the terms of the agreement, plaintiff's employment with Pioneer was contingent upon the approval of the FHLBB.[8] Absent such approval, plaintiff could have no legitimate claim of entitlement to continued employment.[9]

The requirement of prior approval upon which Pioneer conditioned its acceptance of the Employment Agreement was, of course, mandated by Condition 10(p) of the Resolution granting Pioneer's application for Insurance of Accounts. Exhibit G. Condition 10(p) required that Pioneer "provide for employment of a qualified full-time executive managing officer, subject to the

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[8] The Board of Directors' Resolution also required that California Savings and Loan officials approve the employment agreement. Accordingly, plaintiff must come forward with some evidence that the State approved the March 18, 1985, employment agreement. Absent such proof, he cannot establish a legitimate claim of entitlement to continued employment at Pioneer.

[9] Moreover, to give rise to a protected property interest, an understanding must be "mutually explicit." *Roth*, 856 F.2d at 1409; *Hyland*, 972 F.2d at 1140. Clearly, while plaintiff may have cherished a unilateral expectation of continued employment, Pioneer understood plaintiff's employment to be conditioned upon regulatory approval. See Exhibit C. Indeed, in response to an Interrogatory propounded by defendant OTS inquiring as to the basis for the allegation in paragraph 18 of the complaint that "Pioneer was required . . . to obtain the approval of its employment of Pelletier as President by the FHLBSF," plaintiff admitted that he "is not aware of whether any such enforceable requirement exists or existed but is aware that after he was employed and in 1985 and 1986, Pioneer's Board of Directors believed that such a requirement existed." (Exhibit F.)

approval by the Principal Supervisory Agent," and that "the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval." *Id.* The authority to impose such a condition flowed from 12 U.S.C. § 1726(c) (repealed 1989), in which Congress directed that an application for insurance of accounts should be rejected if the institution's financial policies or management are unsafe or the character of the management "is inconsistent with economical home financing or the purposes of this subchapter." Federal regulations were adopted to implement this statutory mandate. Under 12 C.F.R. § 571.6(b)(2)(i), applicants for insurance of accounts were required to submit a business plan providing for "the continuation or succession of competent management subject to the approval of the Principal Supervisory Agent."[10]

Any employment contract between plaintiff and Pioneer that did not contain a condition of regulatory approval would have been contrary to federal law and therefore void. In *Conolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-25 (1986), the Court held that "when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional powers by making contracts about them." *See also Bollow*, 650 F.2d at 1099

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[10] Many of the statutes and regulations pertinent to this case were changed as a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), P.L. No. 101-73, 103 Stat. 183 (1989). Because the relevant actions in this case took place prior to the enactment of FIRREA, this brief refers to the statutes and regulations in effect at that time.

("A void contract is clearly insufficient to support a claim of entitlement to government employment."); *Hyland*, 972 F.2d at 1141 ("promises of continued employment made in direct contravention of applicable law are insufficient to create a claim of entitlement for purposes of the Due Process Clause.").

Plaintiff cannot establish that he held an entitlement to continued employment. At best, he had only a unilateral expectation that he would continue as president of Pioneer. Moreover, even if Pioneer had entered into an agreement with plaintiff that did not contemplate regulatory approval, that agreement would have been directly contrary to federal law and therefore void. Thus, plaintiff has not stated a claim for deprivation of a property interest.

III. PLAINTIFF HAS NOT STATED A CLAIM FOR DENIAL OF SUBSTANTIVE DUE PROCESS.

Plaintiff's complaint also raises a substantive due process claim. To state such a claim, plaintiff must establish an inability to pursue his occupation of choice resulting from actions on the part of defendant Behrens which were " 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.' " *Henderson*, 940 F.2d at 474 (quoting *Lebbos v. Judges of Super. Ct., Santa Clara County*, 883 F.2d 810, 818 (9th Cir. 1989). Plaintiff cannot meet his burden on this issue because the Court of Appeals has already ruled that defendant Behrens wrote the letter to ensure that "the management of newly chartered federal savings

and loan institutions was entrusted to competent, reliable, and trustworthy individuals." 968 F.2d at 877. Moreover, even if plaintiff could prove subsequent communications by Behrens, "the 'business' of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concern regardless of whether or not the employment was initially contingent on the FHLBB's approval." *Id.* Accordingly, plaintiff cannot establish a violation of substantive due process rights.

IV. DEFENDANT BEHRENS IS ENTITLED TO QUALIFIED IMMUNITY.

When a government official claims the protection of qualified immunity, the court must decide "whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful." *ACT Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). To make this determination, the court must decide whether the law governing the official's conduct was clearly established at the time he acted and if, under that law, a reasonable officer could have believed his actions were lawful. *Id.*[11]

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[11] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, it must be resolved "at the earliest possible stage in litigation" and "ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 112 S. Ct. 534, 536-37 (1991). When the facts underlying a claim of immunity are undisputed, "a district court must determine the issue on

Whether the law was clearly established is a question of law to be resolved by the court. *Act Up!*, 988 F.2d at 873. Whether the uncontroverted facts could support a reasonable belief that the conduct was lawful must also be determined by the court. *Id.*

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 111 S. Ct. at 1793. As already set forth, plaintiff has not stated any claim which rises to the level of a constitutional violation. Thus, even if the Court were nevertheless to make such a finding, it would necessarily be based on law that was not **clearly established.** For example, there appears to be no case law supporting plaintiff's argument that the publication of the letter by plaintiff constitutes the deprivation of a liberty interest by defendant Behrens. In addition, the Supreme Court's decision in *Siegert* casts doubt upon the continued viability of plaintiff's entire "occupational liberty" rationale. *See* footnote 5, *supra.* Similarly, there are no cases that clearly establish that an individual whose private employment is conditioned on regulatory approval has a protected property right in that employment. To the contrary, those decisions construing the question have held to the contrary. *See Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212 (5th Cir. 1989) (no clearly established property interest in employment with proposed bank whose existence is contingent

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motion for summary judgment." *Act Up!*, 988 F.2d at 873. *See also Hemphill v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993).

upon regulatory approval); *Meyer v. Fidelity Sav.*, 944 F.2d 563, 576-77 (9th Cir. 1991), *reversed on other grounds sub nom FDIC v. Meyer*, No. 92-741 (U.S. Feb. 23, 1994) (no clearly established property interest in continued employment with federally insured institution in receivership.); *Gallagher v. Hamilton Standard Fed. Credit Union*, No. 93CV1118 (D. Conn. Nov. 11, 1993) (attached at Appendix) (no deprivation of clearly established property right where officials recommended to credit union that it dismiss its contract employees rather than proceeding with formal removal proceedings); *Mann v. Carver*, 644 F. Supp. 129, 132 (E.D. Mo. 1986) (no due process claim where official proposed a reorganization requiring plaintiff to step down as director rather than initiating formal removal proceedings). Indeed, the Court of Appeals has already signaled the unsettled nature of the law applicable to plaintiff's claims, noting that "[w]e have not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled." *Pelletier*, 968 F.2d at 871.

The decisions cited above dictate a finding that the law on which plaintiff bases his claims was and is not clearly established. As the Court of Appeals recognized in *Meyer*, 944 F.2d at 577, the "[r]ules governing federally insured institutions . . . make for treacherous law." The unsettled nature of the law governing plaintiff's claims and the uncontroverted facts of this case show that a reasonable official, standing in the shoes of defendant Behrens, could have believed his conduct was lawful. Plaintiff simply has not stated a violation of any clearly

established constitutional law. Accordingly, defendant Behrens is entitled to qualified immunity.

V. SPECIAL FACTORS COUNSEL HESITATION IN IMPLYING A BIVENS REMEDY

Even assuming that plaintiff could state a constitutional claim, this Court should decline to imply a remedy directly under the Constitution. There are two comprehensive remedial schemes specifically created by Congress to address claims such as those raised by plaintiff in this case.[12] The existence of these statutory schemes is a special factor which precludes implying a remedy under the Constitution.

"The implication by courts of a tort action for alleged constitutional violations is inappropriate when there are 'special factors counselling hesitation in the absence of affirmative action by Congress.' " *Sky Ad v. McClure*, 951 F.2d 1146, 1148 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 58 (1992) (quoting *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971)). One such factor counselling hesitation is "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988).

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[12] This is the argument which the Court of Appeals stated "may merit consideration by the district court at a later stage in the proceedings." 968 F.2d at 871.

When a statutory scheme "has been constructed with careful attention to conflicting policy considerations," it should not "be augmented by the creation of a new judicial remedy for the constitutional violation." *Bush v. Lucas*, 462 U.S. 367, 388 (1988). Thus, if Congress has created " 'a comprehensive statutory scheme to address a particular class of claims, the courts will not act to create additional judicial remedies, even where a particular litigant does not have a remedy available under the statutory scheme.' " *Pereira v. U.S. Postal Service*, 964 F.2d 873, 875-76 (9th Cir. 1992) (quoting *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275-76 (10th Cir. 1991). Under this rule, "[s]o long as Congress' failure to provide money damages or other significant relief, has not been inadvertent," a constitutional tort remedy is precluded. *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989).

The first remedial scheme available to plaintiff is the Administrative Procedures Act (APA). Under 5 U.S.C. § 706(2)(B), the courts of appeals may set aside any agency action "contrary to constitutional right." Here, it is apparent that plaintiff's constitutional claims are a thinly-veiled attempt to obtain money damages based upon a challenge to the constitutionality of a federal regulation. Throughout this lawsuit, plaintiff has maintained that 12 C.F.R. § 571.6(b)(2)(i) (the regulatory source for Condition 10(p)), is invalid because, according to plaintiff, there is no statutory authority for imposing a condition subsequent upon the issuance of insurance of accounts. The gist of plaintiff's argument is that § 571.6 is a statement of policy which, when applied as a substantive rule, had the effect of denying him a hearing under 12 U.S.C. § 1730(g). This, plaintiff maintains, is a violation

of his due process rights. *See e.g.* Pelletier's Memorandum in Opposition to Request to Substitute USA for Behrens, filed August 5, 1991, at 6.

In *Sky Ad*, however, the court held that "Congress' authorization in the APA for courts of appeals to set aside unconstitutional rulemaking" is a special factor counselling hesitation in permitting a constitutional tort action to proceed. 951 F.2d at 1148. Here, as in *Sky Ad*, plaintiff is attempting to circumvent the remedial scheme put in place by Congress to address agency action which is alleged to be contrary to law. That the APA does not permit plaintiff to recover damages is immaterial because Congress' failure to provide for such relief was not inadvertent. *Id.*

The second comprehensive remedial scheme barring plaintiff's claims is that governing the savings and loan industry during the events giving rise to this suit.[13] Savings and loan institutions are subject to pervasive regulation and control by the federal government. The purpose of this expansive regulation is to protect the interests of depositors who have placed their funds in federally-insured institutions. Congress has consistently recognized that the character of an institution's management is of critical importance to this goal. Consequently, Congress granted to the FSLIC and the FHLBB broad authority to determine who could own, operate and manage insured institutions. In 12 U.S.C. § 1726(c), Congress

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[13] Again, except where otherwise noted, the statutory scheme referred to in this argument is that in effect at the time of the events leading to this suit rather than that subsequently established by FIRREA.

directed that the FSLIC reject the application of any institution for insurance of accounts if it found that the institution's financial policies were unsafe or that the character of management was "inconsistent with economical home financing or with the purposes of this subchapter." Tellingly, however, Congress provided no mechanism for administrative or judicial review of decisions made under authority of 12 U.S.C. § 1726(c).[14]

In response to the Congressional mandate to reject applicants for insurance of accounts if the institution's financial policies or the character of its management was inconsistent with Congress' goal of protecting depositors, the FSLIC developed regulations governing "de novo" institutions, that is, institutions like Pioneer which had been in operation for less than three full years. *See* 12 C.F.R. § 571.6(b). Under these regulations, an applicant for insurance of accounts was required to implement a business plan for its first three years of operation providing for "the continuation or succession of competent management subject to the approval of the principal Supervisory Agent." § 571.6(b)(2)(i). It is § 1726(c) and the regulations implementing it which formed the basis for the actions taken by defendant Behrens.

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[14] Even after FIRREA there continues to be no remedy available to an officer of a federally-insured institution whose application for approval is rejected. Under 12 U.S.C. § 1831i, an officer of an institution chartered less than two years must seek approval from the appropriate federal banking agency. The statute provides no remedy for an officer whose application is disapproved.

The statutory scheme crafted by Congress to address the savings and loan industry was not limited to the insurance of accounts arena. For example, even beyond the de novo period, an institution could not be acquired by new owners without FSLIC approval. *See* 12 U.S.C. § 1730(q). One seeking such a change of control was subject to an investigation of his competence, experience, integrity and financial ability, §§ 1730(q)(B)(i), (ii), and was required to provide detailed personal background information. § 1730(q)(6). An adverse decision on the application could be contested at an administrative hearing and was subject to judicial review at the appellate level. 12 U.S.C. § 1730(q)(4), (5). Similarly, officers of an institution were subject to continuing scrutiny by the FSLIC. If the FSLIC found evidence of personal dishonesty, the violation of any law, rule, regulation, or final cease-and-desist order, participation in unsafe or unsound banking practice or breach of fiduciary duties, the officer could be immediately suspended and subjected to formal removal proceedings. 12 U.S.C. § 1730(g)(1), (2). A similar process took place when an officer was charged with a crime involving dishonesty or breach of trust. 12 U.S.C. § 1730(h). A notice of intent to remove an officer under §§ 1730(g) and (h) could be challenged at an administrative hearing. A suspension could be stayed by an appropriate district court upon application by the officer. § 1730(g)(6). Judicial review at the appellate level was available for a final removal. 12 U.S.C. § 1730(h)(2).

It is clear from these detailed provisions that Congress was well aware of the impact an adverse decision by regulators might have upon individual thrift officers,

and knew well how to provide for judicial or administrative review when appropriate. Clearly, a decision to reject an application for insurance of accounts due to the character of management affects not only the institution but also the proposed officer. Yet Congress, in its wisdom, provided no remedy for actions taken by an agency under authority of § 1726(c). Indeed, the continuing intention of Congress to deny a remedy under these circumstances is clearly evident from 12 U.S.C. § 1831i, the current statute. Moreover, the elaborate remedies laid out in 12 U.S.C. §§ 1730(g), (h) and (q) demonstrate that Congress was cognizant of the effect an adverse finding on an officer's qualifications might have and provided for redress where it was deemed appropriate. The failure to provide any remedy in the context of insurance of accounts was not inadvertent. Instead, it reflects the exercise of legislative discretion, after a careful balancing of the interests of an affected individual against the need to protect the soundness of the thrift system. To imply a constitutional remedy here, would contradict the Congressional determination that none should be available.

CONCLUSION

For the reasons stated above, defendant Behrens is entitled to summary judgment in his favor.

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT, EOD MARCH 14, 1994

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. JOHN W. BEHRENS, et al., Defendants.	CASE NO. CV 89-0969-RMT (Tx) PLAINTIFF PELLETIER'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT BEHRENS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT OTS'S MOTION FOR SUMMARY JUDGMENT

ROBERT J. PELLETIER, Counterclaim Plaintiff, vs. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, Counterclaim Defendant.	Date:	Believed Submitted
	Time:	Believed Submitted
	Ctrm:	22
	Disc. C/O:	February 15, 1994
	Mot. C/O:	March 1, 1994
	Pretrial:	May 23, 1994
	Trial:	June 21, 1994

TABLE OF CONTENTS

Table of Authorities iii

I. INTRODUCTION 1

II. PELLETIER'S OPPOSITION TO BEHRENS' ARGUMENTS 2

A. *Behrens Deprived Pelletier of a Liberty Interest* 2

B. *Pelletier Had and Has a Property Interest in His Employment and Profession.* 4

C. *The Behrens Directive Denied Pelletier Substantive Due Process.* 6

D. *Behrens Is Not Entitled to Qualified Immunity.* 8

E. *No Special Factors Counsel Hesitation in Implying a Bivens Remedy in Favor of Pelletier.* 9

III. PELLETIER'S OPPOSITION TO OTS'S ARGUMENTS 10

A. *OTS Is Not Entitled to Sovereign Immunity as the Successor to FHLBB* 10

B. *Behrens Was Acting as the Agent,* inter alia, *of the FHLBSF in Sending the Behrens Directive*..... 10

C. *There Were Acts Subsequent to the Behrens Directive*..... 12

D. *FHLBSF Is an Agent of the Federal Government and Therefore Can Be Liable for Violating Pelletier's Constitutional Rights*..... 12

E. *FHLBSF, and Behrens, Violated Pelletier's Constitutional Rights*..... 13

F. *There Are False Statements in the Behrens Directive, and the Directive Raises False Impressions About Pelletier*..... 13

G. *The Behrens Directive Was Published.* 13

H. *California Recognizes a Claim for Negligent Infliction of Emotional Distress*..... 14

I. *Pelletier's Fifth and Eighth Claims Are Not Time-Barred* 14

J. *Pelletier Had a Binding Contract*..... 15

K. *Pelletier Has Stated a Valid APA Claim* ... 15

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

Federal Cases.

Bollow v. Federal Reserve Bank, 650 F.2d 1093 (9th Cir. 1981) 3

Codd v. Velger, 429 U.S. 624 (1977)..... 3

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989).....8, 9

Elmore v. Shell Oil Co., 733 F. Supp. 544, 546 (E.D.N.Y. 1986).....12, 14

FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991)..... 3

FDIC v. Meyer, ___ U.S. ___, slip op. February 25, 1994 12

Fidelity Financial Corporation v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432 (9th Cir. 1986)..... 13

Greene v. McElroy, 360 U.S. 474, 492 (1959) 4, 8

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987)..... 4

Meyer v. Fidelity Savings, 944 F.2d 563 (9th Cir. 1991) rev. on other grounds, sub nom. *FDIC v. Meyer*,..... 8

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992).....6, 10

Siegert v. Gilley, 111 S.Ct. 1789, 114 L.Ed.2d 284 (1991)..... 3

Truax v. Raich, 239 U.S. 33 (1915) 4

Federal Statutes.

12 U.S.C. § 706.(2)(B) 9

12 U.S.C. § 1726(c) 6, 10

12 U.S.C. § 1730(g) 10, 15

12 U.S.C. § 1730(j)(1) 15

12. U.S.C. § 1730(j)(2)..... 15

Federal Regulations and Rules.

12 C.F.R. §§ 501.10, 501.11 ..... 6, 8, 11

12 C.F.R. § 571.6 ..... 6, 9

F.R.Civ.P. 1 14

F.R.Civ.P. 8 14

F.R.Civ.P. 15(b) 14

State Cases.

Christiansen v. Superior Court, 54 Cal. 3d 868 (1991) 14

Endler v. Schutzbank, 68 Cal. 2d 162 (1968) 8

McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980) 12, 14

Other State Materials.

California Bar Approved Jury Instruction (B.A.J.I.) 12.80 14

I. INTRODUCTION.

Plaintiff Robert J. Pelletier ("Pelletier") submits this Memorandum of Points and Authorities in Opposition to Motions by Defendants John W. Behrens ("Behrens"), and by the Office of Thrift Supervision ("OTS") (as successor in interest to the Federal Home Loan bank Board ("FHLBB") and the Federal Home Loan Bank of San Francisco ("FHLBSF") for Summary Judgment.[1] Pelletier

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[1] To the extent that there exists a separate motion for summary judgment by the United States of America, Pelletier opposes it on the grounds set forth in his opposition to its earlier motion and on the grounds set forth herein.

presents a single Memorandum in opposition to both motions because the two motions raise a number of similar issues, and the OTS, particularly, expressly relies on the Behrens motion rather than separately arguing for a number of the points OTS seeks to make.

This Court should deny both Motions for numerous reasons.

- Both Behrens and the OTS advance arguments in support of points previously decided against them by this Court.

- Both Behrens and the OTS seek summary judgment on the basis of facts that are different from the facts of this case.

- Both Behrens and OTS seek summary judgment on the basis of facts that are disputed, irrelevant, ambiguous, or simply unsupported by admissible evidence by their proponent. See Pelletier's STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT, concurrently filed and served, in which Pelletier sets forth in detail the factual disputes as to *each* of the material facts advanced by Behrens or OTS as "uncontroverted"; Pelletier also objects to many of these same facts on the grounds that they are irrelevant, that they are vague and ambiguous in the form proposed, and/or that defendants have cited no admissible evidence in support of the facts.

Pelletier will respond to the arguments of Behrens and OTS roughly in the order these arguments are presented, taking Behrens first and OTS next.

Pelletier disputes the "statement of facts" offered by Behrens and by OTS. These facts, which are also set forth in Behrens' "Proposed Statement of Uncontroverted Facts and Conclusions of Law," and OTS's "Statement of Uncontroverted facts and Conclusions of Law," are addressed in Pelletier's own "Statement of Genuine Issues of Material fact in Opposition to Motions for Summary Judgment," and will not further be argued herein.

II. PELLETIER'S OPPOSITION TO BEHRENS' ARGUMENTS.

A. Behrens Deprived Pelletier of a Liberty Interest.

Behrens argues that the Behrens Directive did not result in Pelletier's deprivation of a liberty interest. The Behrens Directive, Exhibit D to Behrens' Motion, is a May 8, 1986 letter from Behrens to the Board of Directors of Pelletier's employer, directing the Board to fire Pelletier. Pioneer did fire Pelletier. Pelletier has been compelled to disclose the Behrens Directive to all prospective employers in the financial services industry. As a result, Pelletier's thirty-year career as a financial services executive has been destroyed.

Behrens argues that in order to deprive Pelletier of a liberty interest, the Behrens Directive must create a false and defamatory impression about Pelletier in connection with his termination, and must be disseminated by

Behrens. While Pelletier disputes this position, the Behrens Directive clearly satisfies all those requirements. On its face it creates the impression that Pelletier was somehow materially responsible for the failure of Beverly Hills Savings and Loan Association, or at the very least there were such serious indications of his responsibility that the regulatory authorities considered him unfit to serve in the industry. Pelletier could not conceal the Behrens Directive from prospective employers; it was a fact material to any decision to employ Pelletier, and its existence was sure to come out anyway.

Codd v. Velger, 429 U.S. 624 (1977) is otherwise inapposite. That case involves no dispute between the parties over the truth of the allegations made against Codd in connection with his termination, *id.* at 627, and Codd, a probationary employee, had no right in the job from which he was terminated. *Id.* at 625. Further, *Codd* is an action against the government employer who terminated Codd, and involved no allegation that Codd's career had been ruined.

FDIC v. Henderson, 940 F.2d 465 (9th Cir. 1991), is also inapposite. *Henderson* involved the termination of an officer of an insolvent bank according to statutory procedures. The instant case involves Behrens' lawless order of termination of Pelletier from a solvent institution. Other cases cited by Behrens, *see* Behrens Memorandum, 6 n.4, likewise are inapposite. In *Bollow v. Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *e.g.*, plaintiff was terminated for using profanity against co-workers. *Id.* at 1096. There were no allegations that the Bank publicized the reasons for plaintiff's termination or that plaintiff was required to disclose those reasons. *Id.* at 1101. There was

no evidence plaintiff could not continue his career as a banking lawyer.

Siegert v. Gilley, 111 S.Ct. 1789, 114 L.Ed.2d 284 (1991) is equally inapposite. Siegert, a psychologist, resigned from his position at St. Elizabeth's Hospital, a federal institution, rather than be terminated for absenteeism and insubordination. He later obtained federal employment at an army base. His supervisor wrote to Gilley at St. Elizabeths about him, and Gilley wrote back pejorative comments. Siegert sued for *Bivens* and other claims. The court held that Gilley's statements might be actionable under state law but did not create a *Bivens* claim because they were not made in connection with Siegert's termination. In Pelletier's case, the Behrens Directive was the direct cause of Pelletier's termination from his position as managing officer of Pioneer, and of Pelletier's exclusion from the profession he had pursued successfully for thirty years.

B. Pelletier Had and Has a Property Interest in His Employment and Profession.

Behrens argues that Pelletier had no property interest in his employment because a March 18, 1985 contract conditions that employment on approval by Pioneer's Board and the regulatory authorities. Behrens apparently now concedes that pursuant to *Greene v. McElroy*, 360 U.S. 474, 492 (1959), *Truax v. Raich*, 239 U.S. 33 (1915), *Merritt v. Mackey*, 827 F.2d 1368, 1370 (9th Cir. 1987), and other

authorities cited in previous filings by Pelletier, Pelletier's right to pursue his profession free from government interference was clearly established at the time of the Behrens Directive.

Pelletier disputes that the contract relied upon by Behrens was the operative contract for Pelletier's employment at Pioneer. *See* "Declaration of Robert J. Pelletier in Opposition to Motions for Summary Judgment and Substitution," dated August 1, 1991, filed and served August 5, 1991 (the "Pelletier Declaration"), ¶¶ 10 – 15, and exhibits referenced therein.[2]

Pelletier further contends that the FHLBB consented to and approved his employment at Pioneer by dealing with him as Pioneer's executive managing officer for over a year without any complaint or protest.

Accordingly, Behrens' argument that Pelletier had only a "unilateral expectation" of continued employment has no merit, for it is contrary to the indisputable facts. Pelletier was employed pursuant to a valid contract between himself and Pioneer, the March 7, 1985, contract (Exhibit E to Pelletier Declaration), and with the fourteen-month knowledge and continued acquiescence of FHLBB and other regulatory authorities with whom Pelletier regularly dealt.[3]

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[2] Pelletier requests that the Court take judicial notice of this declaration and attaches a copy as Exhibit A to his "Statement of Genuine Issues of Material Fact" for the Court's convenience.

[3] Note also that FHLBB resolution No. 84-164 (March 29, 1984), attached as Exhibit G to the Behrens Motion, at pg. 1, ¶ 4, requires the "conditions of approval" to be met within six

Additionally, Behrens can cite no authority and no facts in support of *his* authority to send the Behrens Directive. To the contrary, the Ninth Circuit expressly held that "Behrens was not authorized to remove Pelletier from his position as managing officer [of Pioneer]." *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 878 (9th Cir. 1992). Pelletier had a right *not to be terminated by Behrens*. This Court has likewise held that the Behrens Directive was unauthorized. See Order re Behrens substitution request.

Behrens seeks to rely upon statutes and regulations which do not apply to him, and which in fact provide Pelletier with procedural protection denied to him by Behrens and the Behrens Directive. 12 U.S.C. § 1726(c) and 12 C.F.R. § 571.6(b)(2)(i) do not support Behrens' position. He did not proceed pursuant to them, for he had no authority to do so. 12 C.F.R. §§ 501.10, 501.11 *deny* Behrens the authority to send the Behrens Directive.

Behrens myopically addresses only Pelletier's termination from Pioneer, caused by the Behrens Directive, and ignores the fact that the Behrens Directive further destroyed Pelletier's professional career, in which Pelletier had a well-established property interest in 1986.

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months. This provision further strengthens Pelletier's position that the regulatory authorities had approved his employment by May 1986.

C. The Behrens Directive Denied Pelletier Substantive Due Process.

Behrens argues that Pelletier has no substantive due process claim because he cannot prove that Behrens' actions were " ' "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." ' " Behrens' sole authority for this proposition is a purported statement in the Ninth Circuit's *Pelletier* opinion that Behrens sent the Directive to ensure that the management of federally insured institutions was competent and reliable. 968 F.2d at 877.

That is not what the Ninth Circuit said, however. The Ninth Circuit language quoted by Behrens identifies the one of the general objectives of Behrens' employment for the purpose of ascertaining whether the government had lawfully certified that Behrens was acting within the scope of his employment for purposes of substituting the USA in place of Behrens in Pelletier's common law tort claims. Behrens cannot elevate this to a binding finding of fact as to his purpose in sending the Behrens Directive.

Behrens true purpose is a question of fact which cannot be resolved by the instant motion. His purpose is to be found in the tangible evidence, not an abstract legal analysis. After terminating Pelletier, Behrens boasted to a professional colleague, " 'I finally got rid of Pelletier.' " Declaration of Samuel T. Rees in Opposition to Motions for Summary Judgment and Substitution," August 5,

1991, filed and served August 5, 1991 ("Rees Declaration"), ¶ 12 and Exhibit 5, transcript of Schultz deposition, p. 76:22.[4]. Additional evidence suggests that the Behrens Directive had nothing to do with public health, welfare or similar objectives. *See* Pelletier Declaration. ¶¶ 13-15, 17, 18, 22.

D. Behrens Is Not Entitled to Qualified Immunity.

Behrens tries to resurrect his "qualified immunity" argument by suggesting that one's right to employment in a regulated industry was not clearly established in 1986. This is rubbish. One's property right to employment in a regulated industry was clearly established in *Greene v. McElroy*, 360 U.S. 474 (1959), and *Endler v. Schutzbank*, 68 Cal. 2d 162 (1968) *Greene* involves an executive of a defense contractor whose professional career was ruined when the government arbitrarily revoked his security clearance. *Id.* at 478. The regulation of the savings and loan industry hardly begin to approach the extent of regulation of security clearances and defense contractors. *Endler* directly involves regulated financial institutions. *Id.* at 165-66. In each of these cases, extensive government regulation was no barrier to the plaintiff's property interest.

Both *Meyer v. Fidelity Savings*, 944 F.2d 563 (9th Cir. 1991) rev. on other grounds, sub nom. *FDIC v. Meyer*, ___

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[4] Pelletier requests that the Court take judicial notice of this Declaration and attaches a copy as Exhibit B to his Statement of Genuine Issues of Material Fact for the convenience of the Court.

U.S. ___ (slip op. February 25, 1994, attached to OTS Motion), and *Connelly v. Comptroller of the Currency*, 876 F.2d 1209 (5th Cir. 1989) are inapposite. *Meyer* involves an officer of a failed thrift who was fired by the receiver. *Id.* at 565. Pelletier was an officer of a solvent thrift who was terminated because of a Directive sent by Behrens, a regulatory officer who lacked the power to take any such action against Pelletier. 12 C.F.R. §§ 501,10, 501.11 (attached to OTS Motion). *Connelly* involved the refusal of the regulatory authorities to approve a bank in organization. Pioneer, in distinction, had been approved for two years and in operation with insurance of accounts for over a year at the time of the Behrens Directive. Accordingly, neither *Meyer* nor *Connelly* render Pelletier's property rights in his employment or profession even a smidgeon less than *clearly established* at the time of the Behrens Directive.

E. No Special Factors Counsel Hesitation in Implying a Bivens Remedy in Favor of Pelletier.

Behrens attempts to resurrect his "special factors" argument in his instant motion. The Court has rejected this argument. Behrens' argument runs as follows: although Behrens did not act against Pelletier pursuant to *any* statutory scheme, the fact that there was a statutory scheme which might have been applicable requires that Behrens not be held accountable for ignoring that scheme. This argument defies logic and would encourage others in Behrens' position to believe they could act outside the law with immunity whenever they could not

accomplish their desired goals within the law. In other words, Behrens' argument is an argument for anarchy.

Behrens cannot invoke the procedures of the Administrative Procedure Act, e.g., 12 U.S.C. § 706.(2)(B), in his favor, because Pelletier was never afforded any rights under the APA, and Behrens never proceeded pursuant to it. Behrens' discussion of 12 C.F.R. § 571.6 and the APA appeals of "rulemaking" simply misses the point. Behrens cannot take any advantage from 12 C.F.R. § 571.6 because he did not proceed against Pelletier pursuant to that section either. In fact, Behrens had no right under any statute to take action against Pelletier. "Behrens was not authorized to remove Pelletier." *Pelletier v. Federal Home Loan Bank, supra* 968 F.2d at 876.

Behrens cannot hide behind 12 U.S.C. § 1726(c) because that statute provides for the rejection of applications for insurance of accounts, not for the arbitrary termination of officers of insured institutions. Behrens cannot hide behind 12 U.S.C. § 1730(g) because neither he nor anyone else have ever contended that they acted against Pelletier pursuant to that section or afforded Pelletier his rights under that section. The remainder of the statutes cited by Behrens are equally irrelevant for the same reason.

III. PELLETIER'S OPPOSITION TO OTS'S ARGUMENTS.

A. OTS Is Not Entitled to Sovereign Immunity as the Successor to FHLBB.

OTS contends that having been substituted in place of the FHLBSF, it retains its sovereign immunity with respect to Pelletier's claims against the FHLBSF.

The Court decided this point against OTS. *See* this Court's order in this case, entitled "Order Clarifying Substitution Order," October 31, 1991, filed November 6, 1991.[5]

B. Behrens Was Acting as the Agent, *inter alia*, of the FHLBSF in Sending the Behrens Directive.

OTS contends that Behrens was acting exclusively as the agent of the FHLBB in sending the Behrens Directive. This Court decided this point against OTS. *See* "Findings of Fact and Conclusions of Law," January 30, 1992, at 2:2-3 ("On or about May 8, 1986, defendant John W. Behrens ("Behrens"), a supervisory agent of FHLB-SF wrote a letter. . . .).

Should the Court for some reason reverse itself on this point, Behrens' capacity in sending the Behrens Directive still cannot be decided in OTS's favor by motion for summary judgment. Since Behrens had no authority as a "Supervisory Agent" of the FHLBB to write and send

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[5] Pelletier requests that the Court take judicial notice of this and other of its orders in the case attached hereto as Exhibit A for the convenience of the Court.

the letter in the first place, 12 C.F.R. §§ 501.10, 501.11, Pelletier is entitled to a jury finding on whether the letter was sent by Behrens in his capacity as an employee of FHLBSF or some other capacity.

Behrens' argument has an undisclosed premise: that anything Behrens did regarding Pelletier must have been undertaken, as a matter of law, solely in Behrens' capacity as a supervisory agent of the FHLBB, even if that action far exceeded the outer limits of Behrens' authority as a Supervisory Agent.

In support of that unstated premise, OTS implies that the Ninth Circuit in its *Pelletier* opinion concluded Behrens was not acting as the agent of FHLBSF in sending the Behrens Directive. OTS memorandum at 8:3-6. OTS cannot find any support for that conclusion in the *Pelletier* opinion, 968 F.2d 865. The Ninth Circuit concluded only that for purposes of review of the government's certification of substitution of the USA for Behrens with respect to Pelletier's common law tort claims against Behrens, Behrens had acted within the outer perimeter of the scope of his employment.

OTS wrongfully argues that Pelletier was acting exclusively as the agent of FHLBB, relying on 12 C.F.R. §§ 501.10, 501.11. OTS Memorandum at 9:11-14. This regulation provides no authority for Behrens to do what he did, so it cannot shield FHLBSF from liability for Behrens' misconduct. The FHLBSF, through OTS as its successor, must face up to its responsibility for the errant acts of its employee.

C. There were Acts Subsequent to the Behrens Directive.

OTS contends in three different sections of its memorandum (III-A, 11:8-13:2; IV-A, 14:9-15; and V-C, 19:1-5) that there were no acts after May 8, 1986, that affected Pelletier's employment. Pelletier has addressed this point in his Statement of Genuine Issues of Material Fact, at Section A, item 10, and Section B, items 14-16, offering thereat evidentiary support for his position.

OTS as successor to FHLBSF, and Behrens individually, are responsible for Pelletier's compelled republication of the Behrens Directive. *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980); *Elmore v. Shell Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1986). Pelletier has testified to his compelled republication. Pelletier Declaration, ¶ 24. He has also testified from personal knowledge to the custom and practice of consultation by financial institutions with Behrens and other Supervisory Agents regarding executive appointments. *Id.* at ¶ 31.

The best Behrens can say is that the evidence on this point is in conflict. Accordingly, the Court cannot render summary judgment based on this point.

D. FHLBSF Is an Agent of the Federal Government and Therefore Can Be Liable for Violating Pelletier's Constitutional Rights.

Bivens claims may be pursued against agents of the Federal government. *FDIC v. Meyer, supra,* slip op. at 13. FHLBSF was an agent of the government. *See* analysis in *Fidelity Financial Corporation v. Federal Home Loan Bank of San Francisco,* 792 F.2d 1432, 1435-36 (9th Cir. 1986).

E. FHLBSF, and Behrens, violated Pelletier's Constitutional Rights.

Pelletier's opposition to the OTS's argument that there was no violation of Pelletier's Constitutional rights has been stated above at Section II-A through II-D, and need not be repeated here.

F. There Are False Statements in the Behrens Directive, and the Directive Raises False Impressions About Pelletier.

OTS contends that the Behrens Directive was all true. OTS Memorandum, 14:22. Pelletier has addressed the false and misleading statements in the Behrens Directive in Pelletier's Statement of Genuine Issues of Material Fact, supporting his contentions with evidentiary references and textual analysis. Pelletier Statement, Section A, Item 9. The Behrens Directive on its face creates the impression that Pelletier was in some way materially involved in the collapse of Beverly Hills Savings. If that were not the case, Pelletier's prospective employers

would not have reacted negatively to his disclosure of the Directive. Pelletier Declaration ¶ 24.

G. The Behrens Directive Was Published.

Pelletier has presented evidence that the Behrens Directive was published to several dozen persons. Pelletier Statement, Section B, Item 11. The Directive on its face was circulated widely throughout the Eleventh District FHLBB offices and FHLBSF, as well as to the California regulators. Pelletier was compelled to disclose the Directive to any prospective employer. FHLBSF and Behrens are liable for the Pelletier's injuries from that compelled republication. *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980); *Elmore v. Shall Oil Co.*, 733 F. Supp. 544, 546 (E.D.N.Y. 1986).

H. California Recognizes a Claim for Negligent Infliction of Emotional Distress.

OTS argues that there is no *independent* claim for negligent infliction of emotional distress, and that Pelletier's claim for that tort should be subsumed under his negligence claim. OTS memorandum, 15:19-16:3.

Christiansen v. Superior Court, 54 Cal. 3d 868 (1991) addresses this issue in the context of bystander liability. California does recognize the tort of negligent infliction of emotional distress, and even has a Bar Approved Jury Instruction for it. B.A.J.I. 12.80.

I. Pelletier's Fifth and Eighth Claims Are Not Time-Barred.

OTS argues that Pelletier cannot rely on equitable tolling for the period when his claims against FHLBSF and FHLBB were pending as third-party claims in *FSLIC v. Fitzpatrick* (case no. CV 88-00651 RMT(Tx)), because he had not denominated one of his claims as sounding in negligence. Under the Federal Rules, the Court looks to the substance and not the form of the pleadings, which require only a "short and plain statement of the grounds for relief." F.R.Civ.P. 1, 8. Amendments are liberally allowed to conform pleading to proof. F.R.Civ.P. 15(b). This Court can readily find a negligence claim against Behrens and FHLBSF within Pelletier's third party complaint in *FSLIC v. Fitzpatrick*. Pelletier's initial third-party complaint was filed within two-years of the Behrens Directive.

Pelletier has previously addressed the ongoing nature of defendants' conduct and its effect on any statute of limitations problems, as OTS acknowledges. OTS Memorandum, 17 n.20.

J. Pelletier Had a Binding Contract.

OTS asserts that Pelletier had no binding contract with Pioneer and therefore can bring no claim for interference with contract. OTS relies solely on the Behrens Motion. OTS Memorandum, 18:9-10. Pelletier has addressed these arguments at Section II-B, *supra*.

K. Pelletier Has stated a valid APA Claim.

OTS argues that the only source for an APA claim by Pelletier would be if the Behrens Directive constituted a "removal and prohibition" proceeding pursuant to 12 U.S.C. § 1730(g). OTS then argues that the Behrens Directive was not a "removal and prohibition," and that if it had been, Pelletier had to appeal it to an appropriate Federal Circuit Court within thirty days of the issuance of the Directive, relying on 12 U.S.C. § 1730(j)(2). However, § 1730(j)(2) only applies to judicial review of a "cease and desist" order or an order issued after a hearing held pursuant to § 1730(j)(1). The Behrens Directive was not a "cease and desist" order, nor did it issue from a § 1730(j)(1) hearing. Accordingly, OTS's arguments have no merit.

IV. CONCLUSION.

Pelletier has shown above and in his Statement of Genuine Issues of Material Fact that the arguments of OTS and Behrens had no merit. The pertinent facts are all controverted. The law relied upon by defendants does not support their positions.

Pelletier accordingly requests, respectfully, that the Court deny in all respects the motions for summary judgment made by OTS and Behrens.

DATED: March 14, 1994

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[Exhibits Omitted In Printing]

DEFENDANT'S REPLY TO OPPOSITION TO SUMMARY JUDGMENT, EOD MARCH 21, 1994

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ROBERT J. PELLETIER, Plaintiff, vs. FEDERAL HOME LOAN BANK OF SAN FRANCISCO; JOHN W. BEHRENS; FEDERAL HOME LOAN BANK BOARD; and UNITED STATES OF AMERICA, Defendants. AND RELATED CLAIMS	Civil No. CV 89-0969-RMT(Tx) REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT BEHRENS' MOTION FOR SUMMARY JUDGMENT Date: Under Submission Time: N/A Crtrm: 22 Pretrial: May 23, 1994 Trial: June 21, 1994 (Filed Mar. 21, 1994)

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction	1
Argument	1
I. Plaintiff has not demonstrated a genuine issue of material fact	1
A. Uncontroverted Fact	3
B. Summary Judgment should be granted as a matter of law	12
1. Plaintiff was not deprived of a liberty interest	12
2. Plaintiff was not deprived of a property Interest	15

3. Plaintiff does not have a substantive due process claim 17

4. Defendant Behrens is entitled to qualified Immunity 18

5. Special Factors Counsel Hesitation In Implying A Bevins Remedy 18

Conclusion 20

TABLE OF CASES AND AUTHORITIES

CASES

Albright v. Oliver, 114 S. Ct. 807 (1994) 18

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986) 1, 2, 9

Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979) 17

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971) 19

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 1701, 33 L.Ed.2d 548 (1972) 15

Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S. Ct. 1449 (1982) 13, 16

Botefur v. City of Eagle Point, 7 F.3d 152 (9th Cir. 1993) 14

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) 2, 3

Codd v. Velger, 429 U.S. 624, 97 S. Ct. 882, 51 L.Ed.2d 92 (1977) 9, 13, 14

Elmore v. Shell Oil Co., 733 F. Supp. 544 (1988) 14

Endler v. Schutzbank, 68 Cal. 2d 162 (1968) 18

Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, (9th Cir. 1991) 13

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989) 18

Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959) 15, 16, 18

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) 1, 2

McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980) 14

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987) ... 15, 16

Mertik v. Blalock, 983 F.2d 1353 (6th Cir. 1993) 15

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed.2d 405 (1976) 17

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) 3, 5, 10, 12, 17

Procunier v. Navarette, 434 U.S. 555, 98 S. Ct. 855, 55 L.Ed.2d 24 (1978) 18

Siegert v. Gilley, 111 S. Ct. 1789, 114 L.Ed.2d 277 (1991) 14, 18

Sky Ad, Inc. v. McClure, 951 F.2d 1146 (9th Cir. 1991), *Cert. denied*, 113 S. Ct. 58, 121 L.Ed.2d 26 (1992) 19

Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7 (1915) 15, 16

United States v. Gaubert, 111 S. Ct. 1267, 113 L.Ed.2d 335 (1991) 17

STATUTES

12 U.S.C. § 1726(c) (Repealed 1989) 18, 19

REGULATIONS

12 C.F.R. § 571.6..... 18

INTRODUCTION

Defendant Behrens filed a properly-supported motion for summary judgment accompanied by a statement setting forth the incontrovertible facts of this case. Plaintiff has failed to meet his burden of establishing, through the submission of affidavits or other admissible evidence, specific facts which show there is a genuine issue for trial. As set forth below, as well as in defendant Behrens' motion and supporting memoranda, there are no genuine issues of material fact in this case, and defendant Behrens is entitled to summary judgment as a matter of law.

ARGUMENT

I. Plaintiff has not demonstrated a genuine issue of material fact.

When confronted with a properly supported motion for summary judgment, the party opposing the motion must "set forth specific facts showing that there is a genuine issue for trial". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of

material fact." *Id.* at 247-248. (Emphasis in original.) If the record, taken as a whole, would not lead a rational trier of fact to find in favor of the non-moving party, there is no genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A dispute is genuine only if "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). For this reason, the existence of a mere scintilla of evidence or some "metaphysical doubt" as to the material facts, *Matsushita*, 475 U.S. at 586, is not sufficient to avoid summary judgment. Similarly, summary judgment may not be denied simply because a "jury might, and legally could, disbelieve the defendant's" evidence. *Anderson*, 477 U.S. at 256.

In determining whether a material fact is genuinely in issue, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Accordingly, unless a jury could reasonably find that plaintiff "proved his case by the quality and quantity of evidence required by the governing law", summary judgment must be entered in favor of the defendant. *Id.* at 254.

When confronted with a properly supported motion for summary judgment, a plaintiff may not rest upon the

allegations of his pleadings, but must instead come forward with affidavits or other evidence stating specific facts which show there is a genuine issue for trial. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If he does not, "the plain language of Rule 56(c) mandates the entry of summary judgment." *Celotex*, 477 U.S. at 322. There is, however, "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim." *Id.* at 323. Instead, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in rule 56(c), is satisfied." *Id.* The moving party meets this standard simply by " 'showing' – that is pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Plaintiff has failed to come forward with any evidence that would demonstrate the existence of a genuine issue of material fact. To the contrary, the disputes he asserts consist of issues of law, facts that are immaterial to the claims against defendant Behrens, and contentions for which he has provided no evidentiary support.[1]

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[1] Instead of producing affidavits or other evidence to demonstrate the existence of a material factual dispute, plaintiff attempts to challenge the bases for the facts defendant Behrens has demonstrated are uncontroverted. For example, plaintiff argues that certain legal and factual findings made by the Court of Appeals should be ignored by this Court. He further argues that "the Ninth Circuit was ruling on pleadings motions and not

A. The Uncontroverted Facts

1. On March 29, 1984, Pioneer received its insurance of accounts, subject to the condition that it obtain the approval of the FHLBB for any president it might employ during its first three full years of operation. Plaintiff agrees that Pioneer received its insurance of accounts on March 29, 1984. *See* Statement of Genuine Issues of Material Fact at 2. He contends, however, that there is a dispute over whether Condition 10(p), requiring that Pioneer obtain FHLBB approval of any president it might employ during the de novo period, could lawfully be imposed. The nature of this dispute is legal rather than factual. The record is clear that the FHLBB imposed a number of requirements upon Pioneer, including Condition 10(p), in exchange for the issuance of insurance of accounts. *See* Exhibit G to defendant

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determining factual issues." Statement of Genuine Issues at p. 14. There is no support for this argument. To the contrary, the Court of Appeals had before it both the question of whether plaintiff's complaint could survive a motion to dismiss and whether the facts of this case supported the conclusion that defendant Behrens had acted within the scope of his federal employment. Indeed, the court found that "there do not appear to be any factual disputes regarding the scope of Behrens' employment," *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 874 (1992), although it disagreed with this Court about the import of those facts. Moreover, the remainder of the appeal dealt with the denial of a motion to dismiss. In evaluating plaintiff's claims, therefore, the court was required to and in fact did draw all reasonable inferences in favor of plaintiff. *Id.* at 872. Plaintiff cannot now be heard to contest those findings.

Behrens' memorandum in support of his motion for summary judgment. Plaintiff attempts to avoid summary judgment by describing the legal issue of whether the FSLIC and the FHLBB could impose or enforce such a condition as a question of fact. The Court should not countenance this tactic.

2. On March 18, 1985, plaintiff began serving as president of Pioneer Savings and Loan.[2] Incredibly, plaintiff asserts that he will testify that he did not begin his employment with Pioneer on March 18, 1985. He does not however, provide any evidence as to when his employment did commence. The declaration to which he refers does not advance his cause because it does not identify a starting date. In any event, it is difficult to imagine what testimony plaintiff could offer on this point, because he has previously testified that he began his employment with Pioneer on March 18, 1985. Deposition of Robert J. Pelletier dated December 3, 1986, Vol. I, pp. 131-134, attached as Exhibit H to this reply.[3] He made an identical admission in letter to the FHLBB (Exhibit I.)

3. Plaintiff had formerly been employed by Beverly Hills Savings and Loan (BHSL), where he was a

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[2] Plaintiff asserts that there is a dispute between OTS and Behrens as to whether plaintiff was the acting managing officer. Defendant Behrens does not dispute that plaintiff was the acting managing officer.

[3] Defendant Behrens does not know the location of the original of this deposition which was taken during litigation to which he was not party. However, he has received a certified copy, which he will lodge should the Court or any party request him to do so.

member of the Senior Loan Committee. Plaintiff does not dispute these facts. Statement of Genuine Issues at 16.

4. An investigation by the Federal Savings and Loan Insurance Corporation (FSLIC) into the operations of BHSL revealed problems so severe that BHSL was placed in receivership. The continuing investigation by the FSLIC raised questions about the Senior Loan committee. Plaintiff contends that these facts, taken directly from the decision of the Court of Appeals, *see* 968 F.2d at 867, are disputed, primarily because he professes confusion over what they mean. He argues that summary judgment should be denied because defendant Behrens must provide testimony to show both that BHSL was placed in receivership as a result of an investigation and that such an investigation revealed problems with the Senior Loan Committee. Even assuming such a dispute to be genuine (although it clearly is not), it is nevertheless immaterial to the resolution of plaintiff's claims against defendant Behrens. Whether or not BHSL was investigated is relevant only the issue of whether the May 8th letter contained any facts which plaintiff is entitled to dispute at a name-clearing hearing. The letter states only that "an inquiry is currently being conducted . . . into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete." Exhibit D to defendant Behrens' memorandum in support of motion for summary judgment. (Emphasis added.) It is undisputed that after BHSL failed, there was an ongoing investigation of the reasons for its failure. Plaintiff's declaration specifically states that "I was aware throughout

my tenure with Pioneer that the federal regulators were examining the reasons for the failure of BHSL. I fully cooperated in that investigation." Pelletier declaration, ¶ 18. The question of whether the actions of the Senior Loan Committee were being investigated, even if disputed, is also immaterial. The May 8 letter makes no reference to the Senior Loan committee.[4] *See* Exhibit D to Behrens' memorandum in support of motion for summary judgment.

5. In May, 1985, plaintiff entered into an employment agreement with Pioneer, with an effective date of March 18, 1985. Plaintiff now contends that the operative employment agreement was that dated March 7, 1985. He provides no support for this assertion, however. To the contrary, his declaration states that in May, 1985, the March 7th contract was revised by a new agreement, namely, the March 18, 1985, agreement. Pelletier declaration, ¶ 12. Moreover, in a deposition taken during his wrongful termination suit against Pioneer, plaintiff testified, in no uncertain terms, that the March 18th contract was the contract in effect at the time of his termination and that its terms governed his employment. (Exhibit H, vol. I, pp. 131-134). His settlement agreement with Pioneer states the same thing. (Exhibit J.)

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[4] Plaintiff also argues, in response to the statement of uncontroverted facts of defendant OTS, that there is a factual dispute over whether and when any investigation of plaintiff was conducted. Even assuming the existence of such a dispute, it is immaterial to any claim asserted against defendant Behrens. The letter does not state that plaintiff was being investigated. It states only that the failure of BHSL was the subject of investigation.

6. The March 18, 1985, employment agreement was expressly conditioned upon the approval of Pioneer's Board of Directors. Plaintiff relies on his declaration to argue that this fact is disputed. The declaration, however, does not even mention the question of approval by Pioneer's Board of Directors. In any event, the agreement itself explicitly sets forth that requirement. Exhibit A to Defendant Behrens' memorandum in support of motion for summary judgment.

7. On May 9, 1985, Pioneer's Board of Directors passed a resolution approving the March 18, 1985, employment agreement, subject to the condition that the agreement also be approved by the Federal Home Loan Bank Board (FHLBB) and the California Savings and Loan Commissioner. Plaintiff asserts that this fact is disputed but offers no evidence to controvert the minutes of the Board of Directors meeting which establish that such a resolution was made by Pioneer. The apparent basis for plaintiff's argument is his assertion that the March 18th agreement was not the agreement that governed his employment. Plaintiff's own testimony establishes to the contrary. Plaintiff also relies on the State of California's approval of his employment with Pioneer in March, 1985, purportedly to show that state regulators approved the March 18th agreement. However, plaintiff has admitted that agreement was not signed until May, 1985. That California approved his employment in March simply does not establish that it approved the agreement dated March 18, 1985. The record is clear that the March 18th agreement was actually reached in May, 1985, two months after California approved Pelletier as president.

8. On May 13, 1985, Pioneer submitted the March 18, 1985, employment agreement to the FHLBB for approval. Plaintiff does not dispute this fact. Statement of Genuine issues at 19.

9. In April, 1986, defendant Behrens was assigned responsibility for supervising the operations of Pioneer. Plaintiff "does not dispute that in April, 1986, Behrens began exercising some degree of supervision over the operations of Pioneer." Statement of Genuine Issues at 19.

10. On May 8, 1986, defendant Behrens sent a confidential letter to Pioneer's Board of Directors stating that because of the ongoing investigation of BHSL no action could be taken on Pioneer's application for approval of plaintiff as its president. Plaintiff asserts that this statement of fact is not an accurate representation of the letter. The letter speaks for itself: "We wish to advise you that an inquiry is currently being conducted by the federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete." Exhibit D to defendant Behrens memorandum in support of motion for summary judgment.

Plaintiff also asserts that it is untrue the FHLBB was unable to proceed with his application. Even assuming that plaintiff had come forward with facts that would establish a genuine dispute on this issue, it is not material to any claim against defendant Behrens. As set forth in defendant Behrens memorandum in support of his

motion for summary judgment and *infra* at p.13 in this reply, the question of whether the FHLBB should have granted the application for approval is irrelevant. The name-clearing hearing provided under *Codd v. Velger*, 429 U.S. 624 (1977) (per curiam), is not concerned with the adequacy or even the existence of reasons for sending the letter. *Id.* at 627.

11. The May 8, 1986, letter has never been made public by defendant Behrens. Plaintiff argues that this fact is disputed because plaintiff himself has brought the letter to the attention of potential employers and because plaintiff believes "it is customary for a savings and loan association to check with its Supervisory Agent orally as to the qualifications of a prospective senior employee." Pelletier declaration at ¶ 31. Defendant Behrens, however, has explicitly denied any such contacts. Plaintiff's declaration is not to the contrary. Indeed, plaintiff admits that he has "no evidence to suggest that this practice was followed by any of my prospective employers." *Id.* Clearly, plaintiff has not demonstrated a genuine dispute of fact. To the contrary, his argument amounts to a claim that "a jury might, and legally could, disbelieve" defendant Behrens. *Anderson*, 477 U.S. at 256. The Supreme Court has categorically rejected the notion that this sort of challenge can defeat a summary judgment motion. *Id.*

Plaintiff also argues that because the letter, on its face, suggests that it was sent to the Board of Directors of Pioneer, the California Savings and Loan Commissioner, the Eleventh District of the FHLBB, and two other individuals, there is a question of fact regarding whether the

letter was made public by defendant Behrens.[5] In addition, plaintiff asserts that the letter was discussed with FHLBB Supervisory Agent Scott Schultz. Whether providing the letter to fellow regulators or Pioneer's Board of Directors constitutes publication for purposes of a due process claim is a question of law, not fact. As set forth in defendant Behrens' memorandum in support of his motion for summary judgment and infra at p. 14 in this reply, as a matter of law, there has been no publication of the letter by defendant Behrens that could support a claim for deprivation of due process.

12. After receiving the letter, Pioneer requested plaintiff's resignation. When he refused, his employment was terminated by Pioneer. Plaintiff does not dispute these facts. Statement of Genuine Issues at 21.

13. Defendant Behrens wrote the May 8, 1986, letter for the purpose of ensuring that "the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals." *Pelletier*, 968 F.2d at 877. Plaintiff disputes that the Court of Appeals ever made such a finding, and asserts that the testimony of Scott Schultz establishes that defendant Behrens did not write the letter for this purpose. The testimony of Mr. Schultz was before the Court of Appeals when it reached its decision on scope of employment. The Court nevertheless held that:

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[5] Those two individuals were, as plaintiff well knows, fellow employees of defendant Behrens. *See* previously lodged deposition of John Willy Behrens, Volume II, p. 225. A copy of the relevant portion of that deposition is attached as Exhibit K to this reply.

> [W]e think it is clear, that, as a matter of law, Behrens was acting within the scope of his employment when he wrote the letter requesting Pelletier's resignation. Although Behrens was not authorized to remove Pelletier from his position as managing officer, his decision to ask Pioneer to do so did not constitute a deviation from his duties for a personal purpose. Rather, Behrens wrote the letter to further his employer's "business" – namely, that of ensuring that the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable and trustworthy individuals. Taking the allegations in Pelletier's complaint to be true, see supra Part II(C), it is equally clear that, notwithstanding the absence of any similar requirement for regulatory approval with respect to most executive level positions in the savings and loan industry, any subsequent communications that Behrens may have had with potential employers regarding Pelletier's qualifications were also within the scope of Behrens' employment. The "business" of the FHLBB is the supervision of the savings and loan industry to ensure regulatory compliance, and the character and conduct of industry executives are matters within its legitimate concerns regardless of whether or not the employment was initially contingent on the FHLBB's approval.

968 F.2d at 876-877. (Emphasis added). The Court of Appeals has clearly made a determination as to defendant Behrens' purpose in sending the letter. Plaintiff is bound by that determination.

14. Defendant Behrens has not discussed plaintiff, the May 8, 1986, letter, or its contents publicly. As set

out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

15. Defendant Behrens has had no contact with any potential employer of plaintiff. As set out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

16. Defendant Behrens has not taken any action to prevent Mr. Pelletier from securing employment in the financial institutions industry. As set out in the discussion regarding defendant Behrens' Statement of Uncontroverted Facts, ¶ 11, plaintiff has not come forward with any evidence sufficient to avoid summary judgment based on this fact.

B. Summary Judgement Should Be Granted As a Matter or Law.

1. Plaintiff Was Not Deprived of a Liberty Interest

Plaintiff claims he was deprived of a liberty interest without due process because the May 8, 1986, letter stigmatized him. The process due an individual who has been stigmatized in the course of a decision to terminate his employment is a name-clearing hearing. *Codd*, 429 U.S. at 627. However, no such hearing is required unless the defendant "creates and disseminates a false and defamatory impression about the employee in connection

with his termination." *Id.* at 628. *See also Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991).[6] Unless a plaintiff challenges "the substantial truth of the material in question," he is not entitled to a hearing. *Codd*, 429 U.S. at 627.

Plaintiff has failed to produce any evidence to support a conclusion that any facts in the letter are false. To the contrary, each of the facts set out in the letter is uncontroverted.[7] Although plaintiff argues that the letter implies that he was responsible for the failure of BHSL, where false and stigmatizing reasons are not given for the termination of an employee, inferences drawn from the fact of termination alone will not suffice to state a constitutional claim. *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455

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[6] Plaintiff asserts that *Henderson* concerned the termination of an officer of an insolvent bank according to statutory procedures. Plaintiff is mistaken. In *Henderson*, as here, the plaintiff claimed that he was entitled to but did not receive certain statutory procedures. Instead, state regulators met with his employer and issued an ultimatum that they would shut down the bank if it did not terminate the plaintiff's employment. *See* 940 F.2d at 470. The court found that there was no deprivation of a liberty interest because the defendants were not responsible for publicizing any damaging information about the plaintiff.

[7] Plaintiff argues that *Codd* did not involve a dispute between the parties over the truth of the allegations made against the plaintiff there, Velger. He is correct, although this provides him no advantage. The absence of any true dispute over the truth of the allegedly stigmatizing statements about Velger was the reason the Supreme Court found Velger had no claim of constitutional dimension. The same result must obtain here because plaintiff has not met his burden of showing that the letter states any facts that are untrue.

U.S. 948 (1982). The dispute claimed by plaintiff over whether there were sufficient reasons for failing to proceed with his application for approval is immaterial because it is not the proper subject of a name-clearing hearing. *Codd*, 429 U.S. at 627.

Moreover, plaintiff failed to provide any evidence from which a rational fact-finder could conclude that defendant Behrens made the letter or its contents public.[8] Although plaintiff argues that he was compelled to publish the letter himself, there is no authority for the proposition that plaintiff's own conduct can give rise to a constitutional claim against defendant Behrens.[9] In any event, it is clear that even plaintiff did not publish the letter until after he was terminated from Pioneer. Under *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991), any injury resulting from such after-the-fact publication is not of constitutional dimension. *See also Botefur v. City of Eagle Point*, 7 F.3d 152, 158 (9th Cir. 1993) (a claim that false statements made by a governmental defendant impaired

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[8] Providing a copy of the letter to defendant Behrens' employer, fellow employees, Pioneer Savings and Loan and the California Department of Savings and Loan clearly did not make the letter public. The proposition that agencies responsible for regulating insured savings and loans should be aware of regulatory actions taken against those institutions is self-evident.

[9] The cases cited by plaintiff regarding compulsory republication are inapposite because they do not concern any constitutional question. Both *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 796, 168 Cal. Rptr. 89 (1980), and *Elmore v. Shell Oil Co.*, 733 F. Supp. 544 (1988), involved common law claims for defamation.

the plaintiff's liberty interest in pursuing future employment in his chosen profession could not survive because "the alleged defamatory statements were made, if at all, after [plaintiff] resigned.") and; *Mertik v. Blalock*, 983 F.2d 1353, 1363 (6th Cir. 1993) (*Siegert* requires that the injury occur at the same time as the claimed stigmatizing publication.)

2. Plaintiff Was Not Deprived of a Property Interest

Plaintiff argues that the March 7th employment agreement provided him with a property interest in his employment as president of Pioneer. However, this agreement was revised and replaced by the March 18th agreement. Plaintiff's declaration attests to that fact, Pelletier declaration, ¶ 12, and his deposition testimony confirms it. The March 18th agreement specifically requires the approval of Pioneer's Board of Directors. The Board did approve the agreement; however, that approval was expressly conditioned upon the requirement that both the FHLBB and the California regulators approve it as well.[10]

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[10] Mysteriously, plaintiff contends that the argument that plaintiff's March 18th employment agreement did not give rise to a protected property interest somehow concedes that plaintiff has such an interest "pursuant to *Green v. McElroy* (sic.), 360 U.S. 474, 493 (1959), *Truax v. Raich*, 239 U.S. 33 (1915), *Merritt v. Mackey*, 827 F.2d 1368, 1370 (9th Cir. 1987), and other authorities cited in previous filings by.Pelletier." Opposition at 4. Defendant Behrens denies that any of the "other authorities" cited by plaintiff in his numerous previous filings support this contention. If they did, plaintiff would surely have identified them in his opposition to defendant Behrens' summary judgment

Plaintiff makes the circular argument that the FHLBB approved his employment by virtue of failing to disapprove it. His complaint, however, alleges that "the FHLBSF delayed giving Pelletier its approval or disapproval for a material period of time." First Amended Complaint, ¶ 18. In any event, longevity alone does not create a property interest. *Bollow*, 650 F.2d at 1099. Moreover, plaintiff was well aware that his contract had not been approved. See letter of August 6, 1985, from plaintiff to Pioneer stating "[t]he Supervisory Agent acknowledged that although the State Commissioner had already approved me as Managing Officer, the additional approval of F.H.L.B. would be required and the request for such was currently under review." (Exhibit L). Indeed, plaintiff testified that in late 1985 he realized the possibility that the application for approval might be turned down. Previously Lodged Deposition of Robert J. Pelletier, Vol. III, pp. 462-463 ("I think I realized that possibility, or that impression came to me probably around the

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motion. To the contrary, under *Board of Regents v. Roth*, 408 U.S. 564 (1972), he clearly had no legitimate claim of entitlement to continued employment with Pioneer. It is quite clear that neither *Greene*, *Truax*, nor *Merritt* stand for the proposition that a person who does not have an enforceable contract nevertheless possesses a protected property interest in employment. *Truax* was an equal protection case in which the Court held that a state law requiring employers to discriminate on the basis of alienage was improper. 239 U.S. at 43. *Greene* involved a claim by an individual whose previously-granted security clearance was revoked without a proper hearing. 360 U.S. at 475. In *Merritt*, the court required the plaintiff to demonstrate a reasonable expectation of continued employment based upon state law, rules or regulations. 827 F.2d at 1371.

latter part of that year when the approval or the approval of the technicalities wasn't forthcoming.") (Exhibit M.)

In any event, plaintiff has not come forward with any evidence that the state regulators approved the March 18th agreement. The contract which governed plaintiff's employment at Pioneer was conditioned upon the approval of state and federal regulators. No such approval was ever granted. Accordingly, plaintiff cannot establish that he had a legitimate entitlement to continued employment.[11]

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[11] Plaintiff also contends that defendant Behrens lacked authority to send the May 8th letter because the letter constituted a removal. This is immaterial to the claims against defendant Behrens. The mere fact that a complaint alleges tortious conduct by a federal employee does not mean that a constitutional claim has been stated. *Paul v. Davis*, 424 U.S. 693, 699-700 (1976); *Baker v. McCollan*, 443 U.S. 137 (1979). Instead, plaintiff must satisfy each of the elements necessary to state a constitutional claim. The absence of authority to take a particular action will not elevate an otherwise unprotected interest to the level of a property right. In any event, the Court of Appeals rejected the characterization of the letter as a removal, construing it instead as a **request** to Pioneer that it seek plaintiff's resignation. 968 F.2d at 876. Moreover, in *United States v. Gaubert*, 111 S. Ct. 1267, 1279 (1991), the Supreme Court found no merit to the assertion that because formal proceedings were not instituted against an insured institution, regulators had no discretion to take informal action. The Court explained that it has long upheld the authority of regulators to use "the power of persuasion," *id.* at 1279, to accomplish their goals through informal rather than formal means, even where the supervisory mechanism employed "is not specifically set forth in statute or regulation." *Id.* at 1277.

3. Plaintiff Does Not Have A Substantive Due Process Claim

Plaintiff questions defendant Behrens' purpose in sending the letter. The Court of Appeals, however, explicitly found that Mr. Behrens wrote the letter to ensure that "the management of newly chartered federal savings and loan institutions was entrusted to competent, reliable, and trustworthy individuals." 968 F.2d at 877. In any event, plaintiff has no substantive due process claim because "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver,* 114 S. Ct. 807, 813 (1994) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989). Here, plaintiff has raised procedural due process claims based upon the alleged deprivation of liberty and property interests. Hence, his claims are properly evaluated under the explicit textual provisions of the Fifth Amendment rather than the more generalized substantive due process standard.

3. Defendant Behrens Is Entitled to Qualified Immunity

Plaintiff maintains that *Greene,* 360 U.S. 474, and *Endler v. Schutzbank,* 68 Cal. 2d 162 (1968), establish that defendant Behrens violated clearly-established law. As previously set forth, *Greene* is not on point and cannot serve as "established" law applicable to the conduct challenged in this case. Similarly, plaintiff's reliance on *Endler*

is misplaced because it is a state case.[12] More fundamentally, plaintiff has not stated a violation of any constitutional right, let alone one that is clearly established. Thus, defendant Behrens is entitled to qualified immunity. *Siegert*, 111 S. Ct. at 1793.

4. Special Factors Counsel Hesitation In Implying a Bivens Remedy

Plaintiff asserts that the remedy provided by the Administrative Procedure Act (APA) for courts of appeals to set aside unconstitutional agency action is not a special factor counselling hesitation because "Pelletier was never afforded any rights under the APA, and Behrens never proceeded pursuant to it." Plaintiff's Opposition at 9. He claims that defendant Behrens did not act pursuant to 12 U.S.C. § 1726(c) or 12 C.F.R. § 571.6 and that therefore the APA does not apply. This argument misses the mark. Defendant Behrens has always maintained that § 1726 (c) and § 571.6 provided the basis for his actions. Although plaintiff asserts that defendant Behrens did not act pursuant to these provisions, what plaintiff is really arguing is that the regulatory scheme could not **authorize** the FSLIC or the FHLBB to impose or enforce a condition of regulatory approval upon plaintiff because to do so would be violative of his constitutional rights. The point of *Sky Ad, Inc. v. McClure*, 951 F.2d 1146 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 58 (1992), however, is that a plaintiff

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[12] The Supreme Court has rejected the notion that federal courts should look to state decisions for ultimate guidance on constitutional principles. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

may not circumvent the remedial scheme put in place by Congress to address allegedly unconstitutional agency action by bringing a separate action for damages against an individual employee. Yet, that is precisely what plaintiff seeks to do by his suit against defendant Behrens. The responsibility for failing to seek the remedy permitted by Congress cannot be laid at defendant Behrens' feet. Plaintiff could have made such a claim but did not. Under these circumstances a court-fashioned remedy based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), may not be implied.

The comprehensive remedial scheme created by Congress to give the FSLIC and the FHLBB broad authority over the ownership, operation and management of insured institutions is also a special factor counselling hesitation. Plaintiff asserts that this statutory scheme, and in particular 12 U.S.C. § 1726(c), did not permit the defendants to act as they did. However, that Congress provided for remedies in similar contexts but failed to do so with respect to the regulation of insurance of accounts demonstrates the Congressional intention that no remedy be available for claims such as plaintiff's. To allow a constitutional tort action to proceed under these circumstances would be to flout the will of Congress. Accordingly, special factors counsel against the implication of a constitutional tort remedy against defendant Behrens.

CONCLUSION

For the reasons stated above, as well as in the memorandum in support of defendant Behrens' motion for summary judgment and his statement of uncontroverted

facts, there are no genuine issues of material fact, and defendant Behrens is entitled to summary judgment as a matter of law.

Respectfully submitted,

NORA M. MANELLA
United States Attorney

ROGER E. WEST
Assistant U.S. Attorney

Local Counsel

FRANK W. HUNGER
Assistant Attorney General
Civil Division

HELENE M. GOLDBERG
Director, Torts Branch

/s/ Gordon W. Daiger
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[Certificate Of Service Omitted In Printing]

[Exhibits Omitted In Printing]

PLAINTIFF'S APPLICATION TO CERTIFY APPEAL AS FRIVOLOUS, EOD NOVEMBER 1, 1994

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Attorneys for ROBERT J. PELLETIER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, vs. JOHN W. BEHRENS, et al., Defendants.	CASE NO. CV 89-0969-RMT (Tx) EX PARE APPLICATION OF PLAINTIFF ROBERT J. PELLETIER FOR ORDER STRIKING PURPORTED NOTICE OF APPEAL AND EX PARTE APPLICATION OF CHRISTINE A. MURPHY AS VIOLATING LOCAL RULE 2 AND FOR AN ORDER CERTIFYING ANY SUCH PURPORTED APPEAL AS FRIVOLOUS

) AND AS VIOLATING THE
) MANDATE OF THE
) NINTH CIRCUIT COURT
) OF APPEALS; MEMORAN-
) DUM OF POINTS AND
) AUTHORITIES AND DEC-
) LARATION OF SAMUEL T.
) REES
) Date: November 1, 1994
) Time: Submitted
) Ctrm: 22
) Pretrial: December 5, 1994
) Trial: January 10, 1995

TO THIS HONORABLE COURT:

Plaintiff ROBERT J. PELLETIER ("Pelletier") applies ex parte for the following alternative relief against Defendant JOHN W. BEHRENS ("Behrens"):

1. For an Order striking the purported Notice of Appeal and Ex Parte Application to Vacate October 27, 1994, Order on the grounds that both such documents are purportedly signed by a person (Lenard G. Weiss and Christine A. Murphy) who is not the attorney of record for the party (Behrens) on whose behalf they are purportedly filed; and

2. For an Order certifying the purported interlocutory appeal of Behrens from this Court's Order entered on September 7, 1994, as frivolous in light of the mandate of the United States Court of Appeals for the Ninth Circuit as set forth in *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865.

This Application is made on the following grounds:

Striking Unauthorized Pleadings

Apparently, a Notice of Appeal was filed in this action on October 24, 1994. The document purportedly bears the signature of Lenard G. Weiss. In addition, Pelletier understands that Christine A. Murphy has also signed and caused to be filed an ex parte application and supporting declaration seeking to vacate this Court's October 27, 1994, order. In her declaration, Ms. Murphy states that she is a member of the bar of this Court. Neither Mr. Weiss nor Ms. Murphy, however, are counsel of record for Behrens in this action. Andrea McCarthy of the Department of Justice is Behrens' counsel of record in this action and Ms. McCarthy has not filed any Notice of Appeal or ex parte application on Behrens' behalf.

Local Rule § 2.8.2.2 provides that if Mr. Weiss or Ms. Murphy desire to replace Ms. McCarthy as Behrens' attorney in this action, they must file a written substitution of attorney form signed by Behrens and his attorneys. No such document is believed to have been filed in this action and until such a document is filed, neither Mr. Weiss nor Ms. Murphy have any authority to sign pleadings on behalf of Behrens.

Certifying Appeal as Frivolous

On June 29, 1992, the United States Court of Appeals for the Ninth Circuit issued its unanimous opinion in appeal Nos. 89-56265 and 92-55023, a copy of which is attached as Exhibit A to the attached declaration of Samuel T. Rees. In 1989, Behrens had appealed from this Court's denial of his motion to dismiss on the grounds of qualified immunity and the denial of his alternative

motion for summary judgment. The Ninth Circuit noted that "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision" and that Pelletier's contention that repeated interlocutory appeals are used by governmental defendants "as delaying tactics". The Ninth Circuit then held that an official defendant "may not demand repeated appellate consideration of a claim of qualified immunity" and that "[o]ne such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 870-871. As a result, the Ninth Circuit refused to consider the first denial of summary judgment. Behrens had his one interlocutory appeal on qualified immunity and the Ninth Circuit's mandate is clear that he is entitled to no further interlocutory appeals on that issue.

By Petition of Panel Rehearing, served August 11, 1992, Behrens sought to have the Ninth Circuit delete from its opinion that portion which limited him to one interlocutory appeal. See Petition at pages 8-10, a copy of this application is attached as Exhibit B to the accompanying declaration of Samuel T. Rees. By Order, filed September 24, 1993, the Ninth Circuit unanimously denied Behrens' Petition. A copy of this Order is attached as Exhibit C to the accompanying declaration of Samuel T. Rees.

To the extent that it is not already a part of the record in this Action, Pelletier requests that this Court take judicial notice of Exhibits A, B and C to the Rees declaration.

A certified copy of the opinion of the Ninth Circuit as transmitted to this Court and the mandate of the Ninth Circuit was spread on the record of this action. As a result, this holding is not only the law in the Ninth Circuit, it is the law of the case in this action. As such, this mandate renders any attempt by Behrens to appeal at this juncture from this Court's September 7, 1994, order a frivolous act.

The Ninth Circuit has held that a defective notice of appeal may be ignored by the District Court and does not divest the district Court of jurisdiction. *Ruby v. Secretary of the United States Navy* (9th Cir. 1966) 365 F.2d 385, 388-389. More to the point is the Ninth Circuit's holding in *Chuman v. Wright* (9th Cir. 1992) 960 F.2d 104, 105 that if the District Court finds "that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that the defendants have forfeited their right to pretrial appeal, and may proceed with trial."

Pelletier submits that in light of the mandate of the Ninth Circuit in this action, any further pretrial appeals by Behrens are frivolous as a matter of law and a certificate to that effect should be issued.

Pelletier reserves the right to seek appropriate monetary sanctions from Behrens, his counsel and Ms. Murphy at a later date.

On October 31, 1994, Plaintiff's counsel advised Defendants' counsel of Plaintiff's intention to present the instant Application *ex parte*. On November 1, 1994, a copy of this application and supporting papers was faxed to

Defendants' counsel with a courtesy copy faxed to Ms. Murphy.

Respectfully submitted,

DATED: November 1, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for
ROBERT J. PELLETIER

MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum is submitted by Plaintiff ROBERT J. PELLETIER ("Pelletier") in support of his *ex parte* application.

In an apparent last ditch effort to delay the trial of this action, two lawyers not previously involved in this action and purporting to act on behalf of Behrens have sought to disrupt the pretrial proceedings and the trial by filing a frivolous Notice of Appeal and an equally frivolous ex parte application in violation of the mandate in this action of the United States Court of Appeal for the Ninth Circuit and the Local Rules of this Court.

The Ninth Circuit has held in a case which is the law of the case in this action that Behrens has only "one bite of the apple" insofar as interlocutory appeals is concerned. He took that one bite when he appealed from the denial of his motion to dismiss. The Court, as a result of the one bite rule, refused to consider the 1989, denial of

Behrens' summary judgment motion. Similarly, it is anticipated that the Ninth Circuit will dismiss any new interlocutory appeal from the September 7, 1994, order for the same reason.

This Court has two different grounds for ignoring the delaying tactics. It may treat both the Notice of Appeal and ex parte application as unauthorized pleadings since they are neither signed by Behrens or his counsel of record. It may also certify the appeal as frivolous.

The fact that the purported appeal is frivolous is demonstrated by the Ninth Circuit's opinion in *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865, 870-871 as well as the Court's denial of the petition for rehearing on the issue of multiple interlocutory appeals. The fact that a waiver exists comes from the tactical decision of Behrens to appeal the motion to dismiss.

While this Court may simply be authorized to ignore the Notice of Appeal, Pelletier submits that a certification as required by *Chuman, supra* is appropriate under the circumstances and resolves the issue at this level definitively.

For the foregoing reasons, Pelletier respectfully requests that this Court grant this application expeditiously.

DATED: November 1, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for
ROBERT J. PELLETIER

[Declaration Of Samuel T. Rees Omitted In Printing]

[Exhibits Omitted In Printing]

DEFENDANT'S OPPOSITION TO APPLICATION, EOD NOVEMBER 3, 1994

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	NO. CV 89-0969-RMT (Tx) OPPOSITION OF JOHN W. BEHRENS TO PLAINTIFF'S EX PARTE APPLICATION TO STRIKE, AND REPLY TO PLAINTIFF'S OPPOSITION TO BEHRENS' EX PARTE APPLICATION FOR ORDER VACATING OCTOBER 27, 1994 ORDER Date: N/A Time: N/A Place: Courtroom 22 Pretrial: Dec. 5, 1994 Trial: Jan. 10, 1995 (Filed Nov. 3, 1994)

Plaintiff has applied for an order striking defendant John W. Behrens' October 24, 1994 Notice of Appeal from the Court's summary judgment order denying qualified immunity, and also striking Behrens' ex parte application to vacate a Rule 9 order entered three days after trial proceedings were automatically stayed by the Notice of Appeal. The ground plaintiff offers for striking the Behrens pleadings – that they were not signed by Behrens' trial counsel Andrea McCarthy – has no support in law or the Local Rules.

No Rule Prevents Behrens' Appellate Counsel From Acting For Behrens As Associate Counsel

Behrens is filing, contemporaneously with this Opposition, an Association of Counsel formally giving notice of an association previously described in Behrens' November 1, 1994 Ex Parte Application on the Local Rule 9 order, and the supporting Declaration attached to it. As the earlier pleadings clearly state, Behrens is being represented by two sets of counsel, Ms. McCarthy in connection with trial and trial-related activities; and the Steefel firm in connection with his appeal and the stay created by the Notice of Appeal. (See Nov. 1 Ex Parte Application, pp. 1-2; Association of Counsel and Declaration, filed herewith.) This Court's Local Rule 2, § 2.8.2.2, requires that a *substitution* of attorneys be effected by filing "a written substitution of attorney signed by the party and the attorneys." No substitution has occurred or will occur in this case. (November 2, 1994 Murphy Declaration, and letter of Andrea W. McCarthy attached thereto as Exhibit 1.) There is no similar requirement in Rule 2, or

elsewhere in the Local Rules, relating to an *association* of attorneys.

The California Supreme Court has addressed this same issue in the context of a State Statute which, like Local Rule 2, prohibits unwritten substitutions of counsel but says nothing about associations (Cal. Code Civ. Proc. § 284). The Court specifically held that "association of counsel is proper and need not be effected formally." *Vaughn v. State Bar*, 9 Cal.3d 698, 701-02, 108 Cal.Rptr. 806 (1973); see also *Wells Fargo & Co. v. City Etc. of S.F.*, 25 Cal.2d 37, 42-43 (1944) (no written or filed document is necessary to permit attorney associated with party's counsel of record to appear and request relief on party's behalf); *Johnston, Baker & Palmer v. Record Machine & Tool Co.*, 183 Cal.App.2d 200, 206, 6 Cal.Rptr. 847 (1960) (attorney who appears not as substitute for counsel of record, but associated with counsel of record, may appear without any written notice on the record). Nothing in Local Rule 2 suggests that it should be interpreted differently. There is therefore no basis for striking either Behrens' Notice of Appeal or his Ex Parte Application for Order Vacating the Court's Rule 9 order merely because it was signed by an associated attorney recognized by both Mr. Behrens and his trial counsel, Ms. McCarthy.

Even if the authority of Behrens' appellate counsel to appear in this action had ever been a genuine issue, which it was not, the filing of the Association of Counsel eliminates the problem.

This Court Has No Power To Strike Behrens' Notice Of Appeal

In addition, defendant Behrens respectfully submits that the District Court has no authority to strike a notice of appeal, as plaintiff requests. Though a notice of appeal is filed in the District Court, it is filed by the authority of the Federal Rules of Appellate Procedure, not the Federal Rules of Civil Procedure or the Local Rules. Fed. R. App. Pro. 3(a). Trial court rules cannot be applied to appellate procedures. *Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991). Indeed, Appellate Rule 3 expressly provides that as long as a notice of appeal is timely filed, any other error "does not affect the validity of the appeal, but is ground only for such action as *the court of appeals* deems appropriate. . . . " Thus, the sufficiency or insufficiency of a signature on a notice of appeal is a matter that can be determined only by the Court of Appeals. *E.g., Thiem v. Hertz Corp.*, 732 F.2d 1559 (11th Cir. 1984) (appeal that is not signed at all still creates appellate jurisdiction, and cannot be rejected by district court clerk, because signature is not a jurisdictional prerequisite under the Federal Rules of Appellate Procedure). As Behrens has pointed out in his Ex Parte Application to vacate the Rule 9 order, this Court's authority in connection with the appeal is limited to making a frivolousness determination which affects its own jurisdiction, but cannot interrupt the independent jurisdiction of the Court of Appeals. *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992).

Behrens' Appeal Is Not Frivolous

Support for Behrens' contention that his appeal is not frivolous, and that plaintiff's request for such certification should be denied, has already been presented in Behrens' November 1 Ex Parte Application on the Rule 9 order. The "law of the case" argument plaintiff makes is inapposite. In the first place, law of the case is a rule of practice for courts, "not a limit to their power." *Christianson v. Colt Industries*, 486 U.S. 800, 817, 100 L.Ed.2d 811, 831 (1988); *In re PHC Associates*, 949 F.2d 585 (2d Cir. 1991). In any event, Behrens is not asking this Court to ignore the Ninth Circuit ruling in *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992). Behrens is challenging the one-appeal rule not in this Court but in the Ninth Circuit, and potentially in the Supreme Court. "Law of the case" that binds the district court is not binding on an appellate court. *Christianson, supra; In re PHC, supra.* Behrens simply asks this Court to recognize, in the context of a frivolousness determination, that when two other Circuit Courts have held that the *Pelletier* rule is wrong, Behrens has a good faith basis for taking the appeal. Indeed, if a court in the Ninth Circuit had to find a challenge to the *Pelletier* rule "frivolous" simply because it is the current Ninth Circuit rule, then presumably a court in the Sixth Circuit, where the opposite standard prevails, would be compelled to find a *Pelletier* argument "frivolous" simply because the Sixth Circuit disagrees. The bare fact that there is disagreement at the Circuit level is proof that the issue itself is significant, and that neither side of the argument can properly be deemed "frivolous." Behrens therefore respectfully

requests that plaintiff's application for a frivolous certification be denied, and that Behrens' application for an order vacating the Court's October 27, 1994 Rule 9 order be granted.

Date: November 2, 1994

STEEFEL, LEVITT & WEISS
A Professional Corporation

By /s/ Christine A. Murphy
Christine A. Murphy
Appellate Attorneys for
JOHN W. BEHRENS

[Proof Of Service Omitted In Printing]

PLAINTIFF/APPELLEE'S MOTION TO DISMISS APPEAL, EOD NOVEMBER 9, 1994

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Attorneys for ROBERT J. PELLETIER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx) MOTION OF PLAINTIFF AND APPELLEE ROBERT J. PELLETIER TO DISMISS APPEAL AND FOR AN AWARD OF SANCTIONS PURSUANT TO 28 U.S.C. § 1927 AGAINST APPELLANT'S COUNSEL LENARD G. WEISS AND CHRISTINE A MURPHY; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF SAMUEL T. REES IN SUPPORT THEREOF

TO THIS HONORABLE COURT:

Plaintiff and Appellant ROBERT J. PELLETIER ("Pelletier") moves for the following relief against Defendant and Appellant JOHN W. BEHRENS ("Behrens"):

1. For an Order dismissing this appeal for lack of jurisdiction pursuant to *Pelletier vs. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865.

2. For an Order awarding Pelletier sanctions of $5,000 as against Behrens' appellate counsel Lenard G. Weiss and Christine A. Murphy pursuant to 28 *U.S.C.* § 1927.

This motion is made on the following grounds:

On June 29, 1992, this Court issued its opinion in *Pelletier, supra.* In that opinion, this Court held that Behrens is only entitled to one interlocutory appeal on the issue of qualified immunity, which was exhausted by Behrens appeal from the District Court's denial of his motion to dismiss.

In response to this holding, Behrens filed with the Court his Petition of Panel Rehearing, served August 11, 1992. By that Petition, Behrens sought to have this Court delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition.

On October 24, 1994, Behrens has noticed a third interlocutory appeal seeking to appeal from the District Court's denial of his renewed motion for summary judgment. By his Civil Appeals Docketing Statement, Behrens states that his primary issue on appeal is "[w]hether the

trial court erred in denying Appellant's motion for summary judgment on the ground of qualified immunity."

This Court's opinion in *Pelletier, supra* and the subsequent denial of Behrens' Petition for Panel Rehearing constitutes a holding in this case and in this Circuit that this Court will not "entertain" Behrens' October 24, 1994, appeal and it should be dismissed as premature.

Behrens' Civil Appeal Docketing Statement signed by Christine A. Murphy and accompanied by the Notice of Appeal signed by Lenard G. Weiss recognize the foregoing holding in *Pelletier, supra,* to the effect that the appeal violates this Court's one interlocutory appeal rule. 28 *U.S.C.* § 1927 permits the imposition of sanction against counsel who unreasonably or vexatiously multiplies the proceedings in an action. Attempting to appeal a non-appealable order in order to divest the District Court of jurisdiction to proceed with a trial scheduled for January 10, 1995, is precisely the type of misbehavior the statute was intended to punish by sanctions.

This motion is based upon the attached memorandum of points and authorities, the attached declaration of Samuel T. Rees, the exhibits thereto for which judicial notice is requested and upon such further reply memorandum and evidence as may be submitted by Pelletier.

Pelletier respectfully requests that the appeal be dismissed forthwith and that Pelletier be awarded sanctions of $5,000 against both of Behrens' counsel.

Respectfully submitted,

DATED: November 2, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum is submitted by Plaintiff and Appellee ROBERT J. PELLETIER ("Pelletier") in support of the attached motion to dismiss appeal and award sanctions against counsel.

In an apparent last ditch effort to delay the trial of this action scheduled for January 10, 1995, Defendant and Appellant JOHN W. BEHRENS ("Behrens") and two lawyers not previously involved in this action have sought to disrupt the pretrial proceedings and the trial by filing a frivolous Notice of Appeal.

On June 29, 1992, this Court issued its opinion in *Pelletier, supra.* That opinion decided two separate interlocutory appeals taken by Behrens in this action (89-56265 and 92-55023). The first of these two appeals was from the District Court's partial denial of Behrens' motion to dismiss Pelletier's Bivens Claim and the denial as premature Behrens' motion for summary judgment. Jurisdiction for this first appeal was grounded on the fact that both motions sought dismissal of the Bivens Claim on the ground of qualified immunity.

Pelletier asserted in that prior appeal that Behrens should not be allowed multiple interlocutory appeals. This Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one.
>
> *Pelletier* at 870.

This Court then held that "One such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Pelletier* at 871. In reaching this holding, this Court noted that the government official is entitled to make the strategic choice of whether to file an interlocutory appeal from the denial of a motion to dismiss or wait and appeal the denial of summary judgment. If he appeals the former, "he appeals at his peril." *Pelletier* at 871. Having reached this holding, this Court decided the appeal from the motion to dismiss and refused to consider the denial of the motion for summary judgment.

The foregoing holding was not ignored by Behrens. Indeed, in August, 1992, Behrens filed with the Court his Petition of Panel Rehearing, served August 11, 1992. By that Petition, Behrens sought to have this Court delete from its opinion that portion which limited him to one interlocutory appeal. See Petition at pages 8-10, a copy of this application is attached as Exhibit A to the accompanying declaration of Samuel T. Rees. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition. A copy of this Order is attached as

Exhibit B to the accompanying declaration of Samuel T. Rees. Judicial notice of both exhibits is requested.

This Court holding has recently been reaffirmed by this Court in *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1994) 14 F.3d 457, 460-461. In addition, holdings in two other circuits are to the same effect. See *Kaiter v. Town of Boxford* (1st Cir. 1988) 836 F.2d 704, 707-708 and *Abel v. Miller* (7th Cir. 1990) 904 F.2d 394.

The Court in *Abel* as did this Court in *Pelletier* noted that the interlocutory appeal process is subject to abuse by governmental defendants.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.
>
> *Abel* at 396.

On October 24, 1994, Behrens filed his third interlocutory notice of appeal. A true and correct copy of this notice of appeal is attached to the accompanying declaration of Samuel T. Rees as Exhibit C and judicial notice thereof is requested. The notice was signed by Lenard G. Weiss, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf. The notice appeal purports to appeal from an interlocutory order of the District

Court entered September 7, 1994 which denied Behrens' motion for summary judgment.

By Civil Appeals Docketing Statement dated October 31, 1994, the issue on appeal was stated as seeking interlocutory review of the denial of the motion for summary judgment on the ground of qualified immunity. A true and correct copy of this Civil Appeals Docketing Statement is attached to the accompanying declaration of Samuel T. Rees as Exhibit D and judicial notice thereof is requested. The statement was signed by Christine A. Murphy, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

The Civil Appeals Docketing Statement notes this Court's holding in *Pelletier, supra.* Indeed, it seeks to overturn that holding. Behrens and his counsel have chosen an inappropriate method, however, to seek further appellate review and the conduct taken has served merely to disrupt trial proceedings in the Court below.

In the Court below, a Pre-Trial Conference was set for December 5, 1994. Pursuant to Rule 9 of the *Local Rules for the Central District of California,* the parties' counsel are required to meet 40 days in advance of the Pre-Trial Conference date in order to exchange trial exhibits, witness lists and trial contentions. Two days before counsel were required to meet, Behrens noticed this appeal. Behrens' trial counsel, Andrea McCarthy of the Department of Justice, has asserted that the notice of appeal has stayed the action and that Behrens is under no obligation to comply with any of the requirements of *Local Rule* 9.

The Court below had also ordered Pelletier to make available for deposition his retained trial experts. Depositions of Pelletier's economic experts were scheduled for October 26 and 27, 1994. Following the filing of Behrens' notice of appeal, Behrens' trial counsel notified both experts that they need not appear for their depositions because the notice of appeal stayed the action.

Finally, Behrens has filed in the Court below an ex parte application seeking to have the Court vacate an order filed on October 27, 1994, on the grounds that such order is contrary to the stay of this action created by the filing of the notice of appeal.

In sum, Behrens and his counsel have taken an entirely unauthorized action of noticing a third interlocutory appeal and then have used that misconduct to disrupt all proceedings in the Court below. Sanctions against Behrens' counsel are appropriate under the circumstances.

For the foregoing reasons, it is respectfully requested that the motion be granted as prayed.

DATED: November 2, 1994

SAMUEL T. REES
MICHAEL J. WHITE
DAAR & NEWMAN

By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

DECLARATION OF SAMUEL T. REES

I, Samuel T. Rees, declare:

1. I am an attorney at law duly licensed to practice before this Court and in the Court below. I am one of the attorneys of record for Robert J. Pelletier.

2. By Petition of Panel Rehearing, served August 11, 1992, Behrens sought to have this Court delete from its opinion in *Pelletier v. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865 that portion which limited him to one interlocutory appeal. A true and correct copy of this Petition is attached as Exhibit A hereto and judicial notice thereof is requested.

3. By Order, filed September 24, 1993, this Court unanimously denied Behrens' Petition. A true and correct copy of this Order is attached hereto as Exhibit B and judicial notice thereof is requested.

4. On October 24, 1994, Behrens filed his third interlocutory notice of appeal. A true and correct copy of this notice of appeal is attached hereto as Exhibit C and judicial notice thereof is requested. The notice was signed by Lenard G. Weiss, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

5. By Civil Appeals Docketing Statement dated October 31, 1994, the issue on appeal was stated as seeking interlocutory review of the denial of the motion for summary judgment on the ground of qualified immunity. A true and correct copy of this Civil Appeals Docketing Statement is attached hereto as Exhibit D and judicial notice thereof is requested. The statement was signed by

Christine A. Murphy, who at the time was not the attorney of record for Behrens in the Court below and had not previously appeared on Behrens' behalf.

6. In the Court below, a Pre-Trial Conference was set for December 5, 1994 and a trial was set for January 10, 1995. Pursuant to Rule 9 of the *Local Rules for the Central District of California*, the parties' counsel are required to meet 40 days in advance of the Pre-Trial Conference date in order to exchange trial exhibits, witness lists and trial contentions. I had attempted to schedule such a meeting to occur on October 25 or 26, 1994.

7. Behrens' trial counsel, Andrea McCarthy of the Department of Justice, has asserted that the notice of appeal has stayed the action and that Behrens is under no obligation to comply with any of the requirements of *Local Rule* 9 while the appeal is pending.

8. The Court below had also ordered Pelletier to make available for deposition his retained trial experts. Depositions of Pelletier's economic experts were scheduled for October 26 and 27, 1994. Following the filing of Behrens' notice of appeal, Behrens' trial counsel notified both experts that they need not appear for their depositions because the notice of appeal stayed the action.

9. Behrens has filed in the Court below an ex parte application seeking to have the Court vacate an order filed on October 27, 1994, on the grounds that such order is contrary to the stay of this action created by the filing of the notice of appeal.

10. I have spent in excess of 23 hours of unnecessary time as a result the filing of the notice of appeal. I

have spent time researching and drafting opposition to two ex parte applications filed by the defendants and essentially seeking to delay the proceedings in the Court below because of the notice of appeal. I have spent additional time researching and drafting an ex parte application seeking to strike the notice of appeal and certify the appeal as frivolous and/or waived in the Court below. I have spent time researching and drafting this motion. I have spent time preparing for the deposition of Pelletier's economic expert, Peter Formuzis, which was unilaterally cancelled by Ms. McCarthy's communication to him. I have spent time reviewing and researching the papers filed in the Court below by the defendants. I have spent time on telephone calls and letters to and from defense counsel and experts. My normal hourly rate is $225. The reasonable value of the time expended exceeds $5,000.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 2, 1994, at Los Angeles, California.

/s/ Samuel T. Rees
SAMUEL T. REES

[Exhibits Omitted In Printing]

DEFENDANT/APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL, EOD NOVEMBER 14, 1994

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THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff, v. FEDERAL HOME LOAN BANK OF SAN FRANCISCO, et al., Defendants.	NO. 94-56507 Dist. Court No. CV 890969-RMT (Tx) Central District of California

APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

I. FACTUAL AND PROCEDURAL BACKGROUND 2

II. BASIS FOR THE PRESENT APPEAL 3

III. THE ONE-APPEAL RULE OF *PELLETIER I* IS NOT "LAW OF THE CASE" ON THIS APPEAL 5

IV. THE ONE-APPEAL RULE DIRECTLY CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *MITCHELL V. FORSYTH* 6

A. Any Question Of Appellate Jurisdiction Over Second Immunity Appeals Was Necessarily Put To Rest By The *Mitchell* Decision Itself 8

B. This Court Has No Discretion To Decline Second Immunity Appeals 10

1. The Ninth Circuit May Not Readjust The Policy Balance Struck By The Supreme Court In Its Immunity Cases 11

2. *Pelletier's* "One Legal Issue" Theory Does Not Justify A One-Appeal Limit 13

C. The One-Appeal Rule Compels *Bivens* Defendants To Waive Rights That Immunity Exists To Protect 14

V. UNDER APPLICABLE NINTH CIRCUIT LAW, THE ONE-APPEAL RULE SHOULD NOT BE APPLIED RETROACTIVELY TO THIS APPEAL 16

VI. APPELLEE'S REQUEST FOR SANCTIONS IS UNFOUNDED AND SHOULD BE DENIED .. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993) 4, 13, 14

Amwest Mortg. Corp. v. Grady, 925 F.2d 1162 (9th Cir. 1991) 19

Anderson v. Creighton, 483 U.S. 635 (1987) .. 6, 12-14, 15

Becton Dickinson & Co. v. Dist. 65, United Auto., 799 F.2d 57 (3d Cir. 1986) 12

Bendor v. Williamsport Area School Dist., 475 U.S. 534 (1986) 10

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 16

Christianson v. Colt Industries, 486 U.S. 800 (1988) ..5, 11

Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992)... 5, 12, 18

Federal Deposit Ins. Corp. v. Nichols, 885 F.2d 633 (9th Cir. 1989) 11

Forsyth v. Kleindienst ("Forsyth I"), 599 F.2d 1203 (3d Cir. 1979) 8-10

Forsyth v. Kleindienst ("Forsyth II"), 700 F.2d 104 (3d Cir. 1983) 9, 13

Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267 (3d Cir. 1984) 9, 10

Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)..... 17

Gaines v. Davis, 928 F.2d 705 (5th Cir. 1991) 15

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6, 12, 14

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991) 4, 6, 12, 14

Kaiter v. Town of Boxford, 8[illegible] F.2d 704 (1st Cir. 1988) 7, 17

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).....7, 17

Langley v. Adams County, Colo., 987 F.2d 1473 (10th Cir. 1993) 5

Malone v. Avenenti, 850 F.2d 569 (9th Cir. 1988).. 5, 6, 9

Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990)..... 5

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1, 4, 6-15

Murphy v. Morris, 849 F.2d 1101 (8th Cir. 1988)..... 7

Nelson v. Silverman, 999 F.2d 417 (9th Cir. 1993) 5-7, 11, 16, 17

P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, ___ U.S. ___, 113 S.Ct. 684 (1993) 15

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) 1, 2, 4, 6, 7, 11, 13, 15, 16, 17, 18

Siegert v. Gilley, 500 U.S. 226 (1991) 13

T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626 (9th Cir. 1987)..... 18

Van Strum v. Lawn, 940 F.2d 406 (9th Cir. 1991) 16, 17, 18

Wyatt v. Cole, ___ U.S. ___, 112 S.Ct. 1827 (1992) 12

Zayas-Green v. Casaine, 906 F.2d 18 (1st Cir. 1990) 7

STATUTES

28 U.S.C. § 1927..... 18

RULES

Rule 38, Federal Rules of Appellate Procedure 19

REFERENCES

9 Moore, *Federal Practice* (2d ed. 1994) 10

INTRODUCTION

Appellant John W. Behrens appeals an order of the district court denying without opinion his motion for summary judgment, on the ground of qualified immunity, on Appellee's constitutional tort claims. Appellee has moved to dismiss the appeal because in November 1989 Appellant took a prior interlocutory immunity appeal as to some of the claims. That appeal produced a published decision, *Pelletier v. Federal Home Loan Bank of San Francisco ("Pelletier I")*, 968 F. 2d 865 (9th Cir. 1992), in which the appellate panel took the opportunity to announce a new rule governing interlocutory immunity appeals in the Ninth Circuit: The Court would entertain only one pre-trial appeal on immunity issues. The one-appeal ruling was made *sua sponte*, without briefing or discussion at oral argument. In a footnote in the same opinion, the panel observed briefly that the district court had applied the wrong statute of limitations when it dismissed other claims against Appellant as time barred. Those claims, defunct when Appellant Behrens initiated his immunity appeal, were not included in the appeal or before the Court. Thus, in dictum the panel effectively directed reinstatement of the dismissed claims while at the same time declaring them, in dictum, prospectively appeal-proof under the new rule. It then declined to consider any immunity defense relating to those claims because they were not part of the *Pelletier I* appeal.

Appellee argues on the authority of *Pelletier I* that this appeal, which includes the revived claims omitted from the prior appeal, should be dismissed as frivolous and outside the jurisdiction of the Court of Appeals. The appeal, however, is both cognizable and meritorious. The

one-appeal rule announced in *Pelletier I* has no preclusive "law of the case" force here, nor should the rule be independently applied to bar this appeal. Appellant respectfully contends that the Ninth Circuit's prohibition against a second interlocutory immunity appeal is directly contrary to the Supreme Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which was itself a "second appeal" case. Even if the rule were a valid one, however, invoking it here constitutes a retroactive application that would deprive Appellant not just of procedural but of substantive rights. Such an application violates the Ninth Circuit's own retroactivity guidelines and, given the unique history of this case, effects a grossly inequitable result.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1988 Appellee sued the Federal Home Loan Bank of San Francisco and its employee John Behrens, who also functioned as a savings and loan supervisory agent under the direction of FSLIC and the Federal Home Loan Bank Board. The factual history of the case is related in some detail in *Pelletier I*. 968 F.2d at 867-69. As the *Pelletier I* panel noted, Appellee's constitutional tort (or *"Bivens"* claims against Appellant fell into two analytically distinct groups: one set was based on a May 1986 letter written by Appellant, which resulted in termination of Appellee's employment; the other involved "nebulous theories of conspiracy" to prevent Appellee from obtaining other employment in the savings and loan industry. 968 F.2d at 868, 872. The district court dismissed the first set of claims on statute of limitations grounds. 968 F.2d at 869.

Appellant moved to dismiss the remaining *Bivens* claims, asserting a qualified immunity defense, and the district court denied the motion. That order denying the motion to dismiss was the subject of the 1989 *Pelletier I* appeal. 986 F.2d at 869.[1]

In *Pelletier I*, the panel acknowledged the right of a *Bivens* defendant, under the Supreme Court's decision in *Mitchell v. Forsyth*, to take an interlocutory appeal from a denial of immunity at the motion to dismiss stage. The panel announced, however, that the defendant exercised that right "at his peril," because he would be deemed to have forfeited his ability to challenge any later summary judgment decision on an immunity issue. 968 F.2d at 871. Having proclaimed the one-appeal rule, the Court paused briefly to resurrect the letter-based *Bivens* claims previously dismissed as time barred. 968 F.2d at 869 n.6. It then reviewed the claims actually on appeal: Appellant's conspiracy-based *Bivens* claims. The Court concluded that

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[1] Appellee repeatedly refers to this appeal as a "third appeal." Appellee's Motion to Dismiss, pp. 2, 3, 4. That description is misleading. In 1898, Behrens appealed both the denial of immunity, and the denial of his motion under the Federal Employees' Liability Reform and Tort Compensation Act to substitute the United States as the proper defendant on Appellee's common law tort claims. The *Pelletier* panel remanded the non-immunity FELRTCA issue for clarification of the trial court ruling, suspending the entire appeal in the interim. In 1991, when the district court had completed the remand directives, Behrens filed a precautionary second notice of appeal. However, the FELRTCA issue was simply reconsolidated with the still-pending immunity issue, and the two were disposed of – as they had originally been filed – in one proceeding. *Pelletier*, 968 F.2d at 869.

while Appellant's allegations "would be insufficient to survive a motion for summary judgment" even under the relaxed evidentiary standard applied to *Bivens* claims, they were adequate for pleading purposes. 968 F.2d at 872. Thus, after the *Pelletier* decision, Appellant found himself (i) potentially bound by a "strategic choice" he had never wittingly made, and (ii) facing liability on claims that had not existed when he appealed, but (iii) deemed to have waived appellate review of those claims.

In September 1994, without oral argument or opinion, the district court denied Appellant's motion for summary judgment on qualified immunity grounds as to all remaining claims against him. The portion of the order dealing with Appellant's summary judgment motion states *in full:*

> 6. Material issues of fact remain as to defendant Behrens on the *Bivens* claims.
>
> . . .
>
> 8. Motion by defendant Behrens for summary judgment is denied as to the *Bivens* claims.

(September 8, 1994 Order, attached to Declaration of Christine A. Murphy as Exhibit A.) The order gives no indication as to whether or how the district court dealt with the threshold legal issues this Court and the Supreme Court have said must be resolved before a factual dispute on an immunity defense can be sent to the jury; nor does it identify any of the disputed material facts the court found.

II. BASIS FOR THE PRESENT APPEAL

Appellant seeks to pursue this appeal before a merits panel because he is entitled to the qualified immunity that will protect him from trial, and the district court should have granted his summary judgment motion on clear issues of law. The Ninth Circuit has held unequivocally that no immunity defense may go to a jury for resolution of disputed facts until at least two issues are determined as a matter of law: (i) whether the law governing the federal employee's conduct was "clearly established" at the time of the alleged violation; and if so (ii) whether, in light of that law, a reasonable federal employee in the defendant's position could have believed the conduct in question was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The objective reasonableness of the defendant's conduct is itself a legal question which may not be referred to a jury. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 537 (1991); *Act Up!/ Portland*, 988 F.2d at 873. The defendant's actual beliefs and motives are irrelevant if the conduct in question passes the objective reasonableness test. *Id.*

As Appellant will show in his brief on the merits, the appeal is substantively valid. With respect to Appellee's collection of conspiracy-based claims, the panel in *Pelletier I* appears to have determined that applicable law was indeed established. *Pelletier*, 968 F.2d at 872. However, Appellant Behrens contends that at this point in the case, after all factual discovery has been completed, Appellee has come forward with no facts whatever to flesh out the "nebulous theories of conspiracy" which *Pelletier* described as acceptable pleading but "insufficient

to survive a motion for summary judgment." *Id.* As for the resurrected letter-based claims, the *Pelletier* panel itself observed that as of 1992, six years after Appellant wrote the letter declining to approve Appellee's employment, the Ninth Circuit still had not settled whether a person in Appellee's position had any constitutionally protected employment interest which could be impaired by such a letter. 968 F.2d at 871. Absence of clearly established law at the time of the alleged legal violation requires a finding of immunity as a matter of law. *Mitchell,* 472 U.S. at 534-35.

Appellant Behrens filed this appeal because the qualified immunity he is entitled to as a matter of law gives him a right "not to stand trial or face the other burdens of litigation." *Mitchell,* 472 U.S. at 526. The purpose of this appeal is simply to vindicate that right after six years of intensive, exhausting, disruptive litigation.

By order entered November 7, 1994, the district court certified this appeal as waived and frivolous, apparently on the theory that in *Pelletier I* the Court of Appeals had prospectively divested itself of jurisdiction over any subsequent Behrens appeal and is now bound by "law of the case." That is not correct.[2]

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[2] A copy of the District Court's November 7 order is attached to the Murphy Declaration as Exhibit B. The District Court's certification has no effect on the maintenance of the appeal in this Court, nor is it pertinent to Appellee's motion to dismiss. *Langley v. Adams County, Colo.,* 987 F.2d 1473, 1477 (10th Cir. 1993). It merely permits the District Court to resume trial-level jurisdiction over the case while the appeal is pending. *Id.; Chuman v. Wright,* 960 F.2d 104, 105 (9th Cir. 1992).

III. THE ONE-APPEAL RULE OF *PELLETIER I* IS NOT "LAW OF THE CASE" ON THIS APPEAL

This Court is not bound by the *Pelletier* one-appeal pronouncement on any "law of the case" theory. In fact, "law of the case" rules have no application in this context. The doctrine can never prevent an appellate court from revisiting – and retreating from – a ruling it made on a prior appeal in the same case. "Law of the case" is merely a judicial practice, not a limitation on judicial power. *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988); *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990) ("[a]pplication of the doctrine is discretionary"). Moreover, a "significant corollary to the doctrine is that dicta have no preclusive effect." *Milgard*, 902 F.2d at 715-16 (remarks on an issue not before the court in *Milgard I* were not binding in *Milgard II*). As declared in *Pelletier*, the one-appeal rule was pure dictum. The appeal then before the Court was a first one, as the panel conceded, and the availability of future appeals was not raised by either party, nor briefed, nor discussed at oral argument. (See Petition for Panel Rehearing, Exhibit A to Appellee's Motion to Dismiss Appeal, p. 8.) Although the Court subsequently established the rule as a holding in *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993), its advisory meditation on the subject in *Pelletier I* cannot constitute a "law of the case" determination of Appellant's right to pursue this appeal.

Most important, however, is the Ninth Circuit's rule that " 'law of the case' is inapplicable to the question of our jurisdiction to consider an appeal." *Malone v. Avenenti*, 850 F.2d 569, 571 (9th Cir. 1988). In *Malone*, a Ninth

Circuit motions panel heard and denied appellee's motion to dismiss for lack of jurisdiction, then referred the substantive issues to a merits panel. When the appellee raised the same jurisdictional objection before the second panel, appellant insisted that the prior holding was "law of the case." The merits panel not only declined to be bound by the earlier panel's jurisdictional determination, but held flatly that it had an "independent duty" to assess jurisdiction and correct any error. *Id.* According to both *Pelletier I* and *Nelson*, this Court considers the one-appeal rule a jurisdictional matter. *Pelletier*, 968 F.2d at 867; *Nelson*, 999 F.2d at 418 ("we dismiss . . . for lack of jurisdiction"). Thus, this panel, like the merits panel in *Malone*, is vested with both the power and the obligation to determine its jurisdiction of this interlocutory immunity appeal independently of *Pelletier*.

Appellant plainly is not barred from pursuing this appeal by "law of the case" restrictions. The question is simply whether the law of the Ninth Circuit bars him. Appellant respectfully submits that it should not, and in view of contrary authority from the United States Supreme Court, it cannot.

IV. THE ONE-APPEAL RULE DIRECTLY CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *MITCHELL V. FORSYTH*

In 1982, the Supreme Court examined the defense of qualified immunity in the context of two sets of competing interests: the legitimate interests of plaintiffs claiming injury from illegal acts of government officials, and the

equally legitimate right of government employees to perform their duties without fear of personal liability or the harassment of litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982). The balance struck in *Harlow* produced the rule, repeatedly stressed in later Supreme Court decisions, that a claim to qualified immunity must be "resolved at the earliest possible stage of litigation": before trial, and before discovery if possible. *Harlow*, 457 U.S. at 817; *Mitchell*, 472 U.S. at 526; *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, 646 n.6 (1987); *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. at 536. Three years after *Harlow*, in *Mitchell v. Forsyth*, the Court tossed a third factor on the scale – the interest of the judicial system in avoiding piecemeal appeals – and considered the result. Its conclusion, consistent with *Harlow*, was that a civil rights defendant's entitlement to full qualified immunity protection as promptly as it could be established required interlocutory review rights. The Supreme Court held that "denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets" traditional tests for treating an order as " 'final' within the meaning of § 1291," and therefore is appealable on an interlocutory basis. 472 U.S. at 527, 524. The *Mitchell* decision expressly discusses both dismissal orders and summary judgment orders, declaring them equally appealable so long as they reflect a refusal to afford immunity as a matter of law. 472 U.S. at 527-30.

The most straightforward reading of *Mitchell* is that a defendant asserting immunity may take interlocutory appeals twice, if necessary: once at the pleading stage, where the issue is whether the law governing his conduct was "clearly established"; and again at the summary

judgment stage, where facts developed on the record may demonstrate that the official's conduct was objectively reasonable, or that the plaintiff's evidence is insufficient to establish that the official actually did what plaintiff alleges. 472 U.S. at 526. Even the First Circuit, originator of the "one immunity appeal" restriction, concedes that "*Mitchell*, read literally, permits two interlocutory appeals on immunity." *Kaiter v. Town of Boxford*, 836 F.2d 704, 707 (1st Cir. 1988); see also *Zayas-Green v. Casaine*, 906 F.2d 18, 22 (1st Cir. 1990) (same). Two Circuit Courts of Appeal have construed *Mitchell* exactly that way. *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (civil rights action involving immunity defense may give rise to "not one but two interlocutory appeals"); *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988) (limiting defendant to one appeal "would undercut the value of the absolute immunity defense").

The Ninth Circuit, however, has interpreted *Mitchell* – first in *Pelletier* and later in *Nelson* – as providing "several *opportunities* for immediate appeal," but only one appeal. *Pelletier*, 968 F.2d at 871; *Nelson*, 999 F.2d at 418. The reasons the Court states for the one-appeal limit, equity and judicial economy, are primarily policy considerations rather than legal reasons. Nonetheless, both *Pelletier* and *Nelson* treat the matter as a *jurisdictional* defect which bars all second appeals, without regard to any other fact. *Pelletier*, 968 F.2d at 867 ("because Behrens has not previously appealed any denial of qualified immunity, we have jurisdiction"); *Nelson*, 999 F.2d at 418 ("dismiss . . . for lack of jurisdiction").

Appellant contends that the one-appeal limitation is contrary to the Supreme Court's holding in *Mitchell* for at

least three reasons. First, because the appeal the Supreme Court heard in the *Mitchell* case was a second immunity appeal, there is no tenable argument that second appeals *as a category* are outside the jurisdiction of the appellate courts. Second, a single-appeal restriction amounts to a refusal by the Ninth Circuit to exercise its jurisdiction, which it has no discretion to do. Third, the rule is completely inconsistent with the reasoning of *Mitchell*, and indeed guts the qualified immunity defense crafted by the Supreme Court. Appellant respectfully contends that the one-appeal limit is not legally supportable, at least as an inflexible rule of jurisdiction, and should be either abrogated or amended.

A. Any Question Of Appellate Jurisdiction Over Second Immunity Appeals Was Necessarily Put To Rest By The *Mitchell* Decision Itself

The procedural posture of the *Mitchell* case in the Supreme Court establishes that second immunity appeals are not beyond the reach of federal appellate jurisdiction. The case had its origin in a civil rights suit by plaintiff Forsyth against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. In 1978, Mitchell moved for summary judgment on defenses of both absolute and qualified immunity. The district court ruled that as a matter of law Mitchell was not entitled to absolute immunity, and denied summary judgment on the qualified immunity claim based on a finding of disputed facts. Mitchell appealed. *Forsyth v. Kleindienst "Forsyth I"*), 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell*, 472 U.S. at 516. The Third Circuit dismissed the appeal as to qualified immunity on the ground that it was not an

appealable order, but decided the absolute immunity issue. Concluding that the factual record was incomplete, the Court of Appeals outlined the proper absolute immunity test and remanded to the district court. *Forsyth I*, 599 F.2d at 1217. That was the first Mitchell appeal.

Back in the trial court, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues, and granted plaintiff Forsyth's cross-motion for summary judgment on liability. *Mitchell*, 472 U.S. at 516-17. In the words of the Supreme Court: "Mitchell *again appealed*, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity." *Mitchell*, 472 U.S. at 517, emphasis added. The opinion of the Third Circuit merits panel which heard the matter begins:

> This case involves former Attorney General John N. Mitchell's *second interlocutory appeal* from a denial of both absolute and qualified immunity. . . .

Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267, 268 (3d Cir. 1984), emphasis added. The interlocutory decision in *Forsyth III* went to the Supreme Court on writ of certiorari under the name *Mitchell v. Forsyth*. *Mitchell*, 472 U.S. at 518-19.[3]

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[3] Under federal appellate rules, *Forsyth III* was a genuine second appeal, not merely a resumption of *Forsyth I*. An appeal that follows a partial remand for additional fact determinations is a completely new appeal unless, in its remand decision, the appellate court expressly states that it is retaining jurisdiction. *Malone v. Avenenti*, 850 F.2d 569, 573 (9th Cir. 1988). The Third

Before the appeal ever reached the merits panel of the Third Circuit, however, it was referred to a motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst* ("*Forsyth II*), 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction, Judge Sloviter recorded a strong dissent, based primarily on the posture of the appeal as a second appeal. Stressing that "[o]n remand, Mitchell chose to submit no additional testimony," Judge Sloviter said flatly, "I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Forsyth II*, 700 F.2d at 107, 109, emphasis added.

In the Supreme Court, the majority not only noted that the appeal in question was a second one (472 U.S. at 517), they expressly called attention to Judge Sloviter's argument that it was "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Mitchell*, 472 U.S. at 518 n.3. In sum, the "second appeal" issue was recognized by and squarely before the Supreme Court in *Mitchell*. Had it presented a jurisdictional impediment, the Court would have been obliged to dismiss the appeal, since its own jurisdiction depended on the Third Circuit's having held jurisdiction over the second immunity appeal:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties

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Circuit did not do that in *Forsyth I*. See 599 F.2d at 1217. Thus, the merits panel in *Forsyth III* correctly described the appeal as a second one.

> are prepared to concede it. . . . "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986), brackets in original, citations omitted. Thus, the Ninth Circuit's assertion that it lacks jurisdiction over all second immunity appeals merely because they are second appeals is simply not supportable in light of *Mitchell*.[4]

B. This Court Has No Discretion To Decline Second Immunity Appeals

The jurisdiction of the Courts of Appeals over "all final decisions" of the district courts is entirely statutory; moreover, the nondiscretionary nature of the jurisdictional grant in 28 U.S.C. § 1291 "has been construed to make the exercise of jurisdiction obligatory. Read this

---

[4] The appeals the Third Circuit actually heard in *Forsyth I* and *Forsyth III* were absolute immunity appeals. That, however, provides no ground for distinguishing *Pelletier*. The heart of the *Mitchell* holding was that absolute and qualified immunity are of equal dignity and must be appealable on the same terms. Indeed, the First Circuit's one-appeal rule arose from a case involving a first appeal on absolute immunity and a second on qualified immunity. *Kaiter v. Town of Boxford*, 836 F.2d 704. Concluding that immunity is immunity, the *Kaiter* Court held that a defendant is entitled to only one *combined* immunity appeal on both defenses.

way, § 1291 confers on persons aggrieved by a final decision of the district court a *right to review* by the court of appeals." 9 Moore, *Federal Practice* (2d ed. 1994)¶ 110.05. p. 34 (emphasis added). Absent limitations imposed by other statutes, the Court of Appeals must hear appeals from all final decisions, including those decisions which qualify as final under the collateral order doctrine. The Supreme Court stated in *Mitchell* that orders denying qualified immunity are such, whether rendered on a motion to dismiss or on summary judgment. *Mitchell*, 472 U.S. at 527.

The panel in *Pelletier* did not purport to find that second immunity appeals as a group lack any essential characteristics of a collateral order. It simply stated the Court would not hear them because "the burden on civil rights plaintiffs, in terms of both delay and expense, could be considerable"; and because resolution of the "limited issue" on which immunity turns "should not require more than one judiciously timed appeal." *Pelletier*, 968 F.2d at 870, 871. Neither rationale offers any basis for a refusal to exercise jurisdiction over a final decision of the district court, and both are refuted by Supreme Court authority.

1. The Ninth Circuit May Not Readjust The Policy Balance Struck By The Supreme Court In Its Immunity Cases

The Ninth Circuit justifies its one-appeal limit with what amounts to a cost-benefit analysis. Briefly conceding the benefit of resolving immunity issues before trial, the Court emphasizes cost:

> However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets.

Nelson, 999 F.2d at 418. The Courts of Appeals, however, may not exercise or decline jurisdiction based on equitable considerations, even in situations they consider extreme. *Christianson v. Colt Industries*, 486 U.S. 800. In *Christianson*, an appeal had bounced back and forth twice between the Federal Circuit and the Seventh Circuit, each bench insisting that it had no jurisdiction. Ultimately, the Federal Circuit, though still convinced that jurisdiction properly lay elsewhere, undertook to decide the appeal "in the interest of justice" rather than subject the hapless parties to the expense and inconvenience of yet another transfer. 486 U.S. at 806-07. The Supreme Court sympathized, acknowledged that its result was "exasperating for the litigants (and wasteful for all concerned)," but vacated the judgment and retransferred to the Seventh Circuit. Jurisdiction, it said, is not a matter of equity. 486 U.S. at 818; *cf. Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d 633 (9th Cir. 1989) (district court may not decline jurisdiction to prevent unfair forum-shopping). Similarly, an appellate court may not reshape its jurisdiction to facilitate docket-control and efficiency. *E.g., Becton Dickinson & Co. v. Dist. 65, United Auto.*, 799 F.2d 57, 61 (3d Cir. 1986).

Even if a categorical refusal to hear second appeals were permissible, which it is not, there are less harsh means of ameliorating the delays and inefficiencies the

Ninth Circuit perceives as attending multiple interlocutory immunity appeals. In *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992), for example, the Court held that a district court may proceed to trial of a *Bivens* action despite a pending interlocutory appeal under appropriate circumstances. If the district judge deems the appeal waived or frivolous, he may resume trial-level jurisdiction unless and until the Court of Appeals imposes its own stay. 960 F.2d at 105. That procedure provides both the district court and appellate court with a considerable measure of control over genuinely meritless appeals.

In any event, the Supreme Court has already considered and weighed, in some detail, the competing claims of plaintiffs, defendants and the judicial system in immunity cases. Since *Harlow*, the Supreme Court's decisions have been consciously geared to "strike[ ] a balance between compensating those who have been injured by official misconduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, ___ U.S. ___, 112 S.Ct. 1827, 1833 (1992); *Anderson*, 483 U.S. at 638, 639. Careful consideration has been given to the negative aspects of "piecemeal appeals," including the potential burden on the courts. *E.g., Mitchell*, 472 U.S. at 518. On the whole, the balance has been struck in favor of immunity claims, as evidenced by the Supreme Court's repeated emphasis on the importance of affording defendants the benefits of the immunity defense "at the earliest possible stage in litigation." *Hunter*, 502 U.S. 224, 112 S.Ct. at 536; *Anderson*, 483 U.S. at 646 n.6. Appellant respectfully submits that this Court may not reweigh policies already ranked by the Supreme Court, nor impair the full interlocutory appeal rights that are an essential

component of the immunity equilibrium the Supreme Court has fashioned.

2. *Pelletier's* "One Legal Issue" Theory Does Not Justify A One-Appeal Limit

If the *Pelletier I* panel offered any legal rationale for the one-appeal rule, as distinct from efficiency considerations, it is that immunity appeals pose "a limited legal issue" which "should not require more than one judiciously timed appeal." *Pelletier*, 968 F.2d at 871. That is the ground on which Judge Sloviter, the dissenter on the *Forsyth II* motions panel, would have dismissed Attorney General Mitchell's second immunity appeal: "the Third Circuit's earlier consideration of the same issue." *Mitchell*, 472 U.S. at 518 n.3. Indeed, the argument had some force on the *Mitchell* facts. Mitchell, who "chose to submit no additional testimony" after his first appeal, had simply refiled the same summary judgment motion and appealed the same legal determination on the same record. *Forsyth II*, 700 F.2d at 107. The Supreme Court noted Judge Sloviter's protest, but apparently did not find the duplicative procedure a problem.

The *Mitchell* opinion also identifies at least two different questions of law that are properly reviewable by interlocutory appeal, depending on the point the case has reached in the trial court:

> [W]hether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions *or*, in cases where the district court has denied summary judgment for the defendant . . . , whether the law clearly

> proscribed the actions the defendant claims he took.

472 U.S. at 528, emphasis added; see *Act Up!/Portland*, 988 F.2d at 871 (legal disposition of immunity defense "requires a two-part analysis"). Generally, whether pertinent law as clearly established can be determined on the pleadings. Even if the defendant denies that he committed the acts plaintiff alleges, that dispute is irrelevant: the initial question is whether the acts *alleged* are a violation of clearly established law, or indeed are a constitutional violation at all. *Mitchell*, 472 U.S. at 528; *Siegert v. Gilley*, 500 U.S. 226 (1991). Thus, a defendant exercising his right to resolution at "the earliest possible stage" will move for dismissal or summary judgment on that ground, and he is entitled to have that issue properly resolved before he is forced to submit to discovery. *Anderson*, 483 U.S. at 646 n.6. According to *Mitchell*, a "clearly established law" ruling is an appropriate one for interlocutory appeal. *Mitchell*, 472 U.S. at 527-28.

The second legal question, *pertinent only if the first is resolved against the defendant*, is whether the conduct at issue was objectively reasonable under settled law and the circumstances of the case. *Hunter*, 502 U.S. 224, 112 S.Ct. at 537. That inquiry is more fact based, frequently requires some discovery, and is properly addressed on summary judgment. *Id.*; *Act Up!/Portland*, 988 F.2d at 872-73. Again, the Supreme Court has held that an interlocutory appeal is appropriate. *Hunter, supra*; see *Mitchell*, 472 U.S. at 527-78. In sum, there clearly are at least two threshold legal issues, not one, which must be resolved before a *Bivens* defendant like Appellant may be compelled to face a jury. If the defendant is to be permitted

only one appeal, an erroneous ruling on the first issue will subject him to discovery and other litigation burdens he is entitled to avoid, because caution forbids a premature appeal. See *Harlow*, 457 U.S. at 817 (right to avoid discovery is a key part of the immunity entitlement); *Mitchell*, 472 U.S. at 526 (same); *Anderson*, 483 U.S. at 646 n.6 (same). And there, quite apart from any issues of jurisdiction, lies the error of the one-appeal rule: it clashes at a very fundamental level with the concept of qualified immunity as the Supreme Court has shaped it.

C. The One-Appeal Rule Compels Bivens Defendants To Waive Rights That Immunity Exists To Protect

In *Harlow*, the Supreme Court defined qualified immunity as encompassing not merely protection against ultimate liability, but against "the costs of trial [and] the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18. The interlocutory appeal right confirmed in *Mitchell* was based squarely on that explication of the nature and function of immunity. A pre-trial order denying immunity is final and appealable precisely because it "conclusively determines the defendant's claim of right not to *stand trial*," or his right to avoid "even such pretrial matters as discovery." *Mitchell*, 472 U.S. at 526, 527. Though a post-trial appeal can protect against unwarranted liability, a mistaken dismissal or summary judgment ruling will destroy trial and pretrial immunity irretrievably if interlocutory review is unavailable. *Mitchell*, 472 U.S. at 525-27. In short, "the benefit conferred by qualified immunity to individual officials, is for the

most part lost as litigation proceeds past motion practice." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, ___ U.S. ___, 113 S.Ct. 684, 688 (1993).

The primary effect of the *Pelletier* one-appeal rule is to force a *Bivens* defendant to waive part of his immunity in order to protect the rest. The Ninth Circuit candidly underscores the seriousness of the dilemma the rule creates. Despite the Supreme Court's repeated stress on early resolution of immunity claims, the *Pelletier I* panel held flatly that a defendant who loses "at the motion to dismiss stage . . . appeals at his peril." *Pelletier*, 968 F.2d at 871. A federal employee whose house and personal bank account are at stake is not likely to underrate the scope and extent of that peril. As a result, a district court can effectively force a waiver of discovery immunity simply by denying motion to dismiss or for summary judgment until after wide-ranging discovery has been completed. That is clearly improper. *Anderson*, 483 U.S. at 646 n.6. It also happens. *E.G., Gaines v. Davis*, 928 F.2d 705 (5th Cir. 1991) (court could not refuse to rule on immunity until after defendants were deposed). And in the Ninth Circuit, it is a wrong that is effectively without remedy. What prudent defendant would use his one pre-trial appeal opportunity to vindicate discovery-related rights, clear and unequivocal as the entitlement is, when the chief result is to appeal-proof a subsequent order sending him to trial? It is in fact pure sophistry to speak of a *Bivens* defendant's "several opportunities for immediate appeal" when using one opportunity automatically eliminates the others. *Pelletier*, 968 F.2d at 870.

On the authority of *Mitchell*, the Ninth Circuit is clearly wrong in its assertion that the Courts of Appeals

have no jurisdiction over second interlocutory immunity appeals as a category. Further, neither equity nor judicial economy nor the rationale of the Supreme Court's immunity cases offers any legitimate basis for the Court's declining to hear a second appeal that meets the collateral order requirements outlined in *Mitchell*. Appellant respectfully submits that the one-appeal rule should be abandoned, or at least applied in a more flexible fashion than current Ninth Circuit case law permits.

V. UNDER APPLICABLE NINTH CIRCUIT LAW, THE ONE-APPEAL RULE SHOULD NOT BE APPLIED RETROACTIVELY TO THIS APPEAL

Even if the Court adheres to its one-appeal restriction, the Ninth Circuit's own retroactivity guidelines counsel against applying the rule to dismiss this appeal. Retroactivity is a genuine issue here. The *Pelletier I* and *Nelson* opinions treat the filing of an interlocutory appeal as essentially a waiver of any future pretrial appeals; they are phrased in terms of choice, opportunity and strategic decision. Appellant Behrens, however, was afforded no choice. He had no opportunity to select a "judicious" strategy because he had no warning that the filing of his appeal in November 1989 would have any implications for future appeal rights. *The Pelletier I* panel locked Appellant into an ex post facto decision by announcing, *sua sponte*, that in the Ninth Circuit a first interlocutory appeal was also a last interlocutory appeal. It then compounded Appellant's predicament by volunteering in a footnote an observation on the statute of limitations applicable to a set of *Bivens* claims that had been dismissed by the district court, were not on appeal, and

played no part in any strategy considerations leading to the appeal. *Pelletier*, 968 F.2d at 869 n.6. Those claims, revived as result of the panel's comment, are now the core of the lawsuit. Ironically, the dismissed claims were resurrected on the authority of a Ninth Circuit decision which held it unfair and inequitable to apply a statute of limitations decision retroactively. *Id., citing Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991).

The *Van Strum* decision outlines three tests for retroactive application of Court of Appeals decision:

> (1) whether the decision establishes a new principle of law; (2) whether retroactive application will further or retard the purposes of the rule in question; and (3) whether applying the new decision will produce substantial inequitable results.

Van Strum, 940 F.2d at 410, *citing Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). By those standards, the one-appeal rule should not be applied to bar this appeal.

First, the panel's opinion in *Pelletier I* plainly announced a new limitation that did not previously exist in the Ninth Circuit or indeed anywhere except the First Circuit. As of November 1989, the available authority on the number of permissible interlocutory immunity appeals consisted of *Mitchell v. Forsyth*, which itself involved a second appeal; opinions from the Sixth and Eighth Circuits confirming the availability of two interlocutory appeals;[5] and a lone decision from the First

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[5] *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986); *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988).

Circuit which imposed a one-appeal limitation while candidly acknowledging "the argument that *Mitchell*, read literally, permits two interlocutory appeals on immunity, one from the denial of a motion to dismiss and another from the denial of a motion for summary judgment." *Kaiter*, 836 F.2d at 707. After Appellant's first appeal was filed but before it was decided, another Ninth Circuit panel, citing the Sixth Circuit's *Kennedy* opinion, indicated that it recognized a second-appeal option. *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991). The *Pelletier* rule was therefore a genuinely new rule with enormous impact on *Bivens* defendants, and one that conflicted with existing Ninth Circuit authority at the time it was instituted.

Further, retroactive application to Appellant frustrates at least one of the purposes behind the single-appeal rule. The *Pelletier I* and *Nelson* panels plainly were motivated in large measure by a straightforward desire to reduce, in absolute terms, the number of interlocutory appeals the judicial system would have to deal with. Retroactive application obviously facilitates that result. Both panels, however, expressed an intention to insure defendants the opportunity for one meaningful, "judiciously timed" appeal that would preserve "the rule of the defense as 'an *immunity from suit* rather than a mere defense to liability.' " *Pelletier*, 968 F.2d at 871; *Nelson*, 999 F.2d at 418. If Appellant is allowed no review now on the claims the *Pelletier I* panel abruptly revived in the 1989 appeal, his immunity defense to those claims will have been reduced to a "mere liability" defense, appealable only if and after he loses at trial. Through no choice of his own, Appellant will never have had an opportunity for

pretrial appellate review of any kind on those claims. That result is contrary to the intended operation of the single-appeal rule, and also reflects the kind of grave inequity contemplated by the third prong of the *Van Strum* test for nonretroactivity. This Court ruled in *Van Strum* that it was unfair "to hold that the plaintiff 'slept on his rights' where the plaintiff had no advance notice of the change announced." *Van Strum*, 940 F.2d at 410-11. It is at least as unfair to hold that Appellant Behrens must suffer the consequences of a strategic choice he had no reason to know he was making, and of the *Pelletier I* panel's tinkering with a dismissal no party had placed before the Court.

The inequity of a retroactive appeal bar in this case is compounded by the fact that the appeal is meritorious on the law. The Pelletier I panel itself effectively acknowledged that the law governing the previously dismissed *Bivens* claims was not clearly established at the pertinent time. *Pelletier*, 968 F.2d at 871. It also observed that unless Appellee supplemented his allegations on the *Bivens* claims the Court did examine, which Appellee has been unable to do, a summary judgment motion would succeed where the pleading-based dismissal motion failed. 968 F.2d at 872. Appellant respectfully submits that under *Van Strum* principles, the one-appeal rule should not be applied retroactively to Appellant Behrens current appeal.

VI. APPELLEE'S REQUEST FOR SANCTIONS IS UNFOUNDED AND SHOULD BE DENIED

Appellee has requested sanctions against Appellant's counsel pursuant to 28 U.S.C. § 1927, apparently on the ground that the appeal is barred by Pelletier I and was taken for purposes of delay. Sanctions are not appropriate, whether under § 1927 or otherwise.

"The law of this circuit requires that imposition of costs and fees under § 1927 may be made only on a finding that the attorney acted ' "recklessly or in bad faith." ' " *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 638 (9th Cir. 1987). Even the filing of a genuinely frivolous appeal "does not of itself establish bad faith." *Id.* Here, Appellee has merely alleged, without support, that Appellant's counsel filed the appeal for purposes of delay. That is untrue and refuted by the facts. Promptly after Appellant's notice of appeal was filed, counsel filed in the district court a pleading which (i) informed the court of the notice of appeal and the stay of trial proceedings that attended it; (ii) advised the court that under *Chuman v. Wright, supra*, the district court could resume jurisdiction at the trial level by certifying the appeal as frivolous or waived; (iii) advised the court of the basis for the appeal; and (iv) requested that the court vacate an order requiring pretrial evidentiary exchanges which had been entered after the notice of appeal was of record. A copy of the pleading is attached as Exhibit C to the Murphy Declaration filed herewith. The district court did certify the appeal as frivolous and is presently requiring the parties to proceed toward trial.

Further, sanctions for a frivolous appeal should not be imposed under Rule 38 of the Federal Rules of Appellate Procedure unless the appeal is "wholly without merit." *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991). Counsel respectfully submits that this Opposition memorandum adequately demonstrates that the appeal is not meritless.

CONCLUSION

The Ninth Circuit's single immunity appeal rule cannot and should not be invoked to bar Appellant's pending interlocutory appeal. The order appealed from is a final determination of Appellant's right, based on qualified immunity, not to stand trial on *Bivens* claims, and is an appealable collateral order within the rule of *Mitchell v. Forsyth*. No jurisdictional limitation prevents this Court from hearing the appeal; and in any event, retroactively applying the one-appeal restriction to Appellant would both frustrate an express purposes of the rule and produce a gravely inequitable result on the facts of this case. Appellee's motion to dismiss the appeal, and for sanctions, should be denied.

Date: November 14, 1994

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[Proof Of Service Omitted In Printing]

PLAINTIFF/APPELLEE'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL, DATED NOVEMBER 16, 1994

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT J. PELLETIER, Plaintiff-Appellee, vs. JOHN W. BEHRENS, Defendant-Appellant.	NINTH CIRCUIT NO. 94-56507 CENTRAL DISTRICT NO. CV 89-0969-RMT (Tx) REPLY MEMORANDUM OF PLAINTIFF AND APPELLEE ROBERT J. PELLETIER IN SUPPORT OF MOTION TO DISMISS APPEAL AND FOR AN AWARD OF SANCTIONS PURSUANT TO 28 U.S.C. § 1927 AGAINST APPELLANT'S COUNSEL LENARD G. WEISS AND CHRISTINE A MURPHY AND SUPPLEMENTAL DECLARATION

Plaintiff and Appellant ROBERT J. PELLETIER ("Pelletier") submits this brief reply memorandum in support of his motion to dismiss this third effort Defendant and Appellant JOHN W. BEHRENS ("Behrens") to delay the trial in the Court below by filing improper interlocutory appeals.

Behrens asserts that this is not his third trip to this Court to seek interlocutory review of the denial of his claim for qualified immunity. Contrary to the opposition, Behrens in 1989 appealed from the District Court's denial of his motion to dismiss and also from the District Court's denial of his motion for summary judgment. Both denials were contained in a single order of the District Court and were briefed and argued by Behrens in connection with Appeal No. 89-56265. When this Court held that Behrens was only entitled to one interlocutory appeal, it refused to consider the 1989 denial of his motion for summary judgment.

Behrens asserts that the "one appeal rule" is being applied retroactively as to him. This also is incorrect. As this Court's opinion in *Pelletier v. Federal Home Loan* (9th Cir. 1992) 968 F.2d 865 demonstrates, Pelletier asserted in the 1989 appeal that Behrens should not be given repeated "bites of the apple" to file interlocutory appeals and thereby deprive Pelletier of a prompt trial of his claims. This Court noted that

> Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment, will encourage official defendants in

> civil rights cases to use such appeals as delaying tactics is not an idle one.

Pelletier at 870.

Behrens was obviously aware of this issue because it was contained in the brief on appeal and argued to this Court at that time.

Behrens asserts that he has not been given an opportunity to argue that the "one appeal rule" is erroneous. This assertion is erroneous as Behrens filed a Petition for Panel Rehearing served August 11, 1992 in connection with the 1989 appeal specifically raising this issue. The denial of that Petition by unanimous Order, filed September 24, 1993, is a ruling on the merits.

Behrens asserts that the "one appeal rule" is contrary to holdings of the United States Supreme Court. However, this Court holding has recently been reaffirmed by this Court in *Mendocino Environmental Center v. Mendocino County* (9th Cir. 1994) 14 F.3d 457, 460-461, is also the law in two other circuits and has never been reversed or vacated by the Supreme Court. See *Kaiter v. Town of Boxford* (1st Cir. 1988) 836 F.2d 704, 707-708 and *Abel v. Miller* (7th Cir. 1990) 904 F.2d 394. Thus, it is the prevailing rule on the subject and has been so for six years.

Behrens asserts that new claims were asserted in the District Court which were not reviewed in his prior appeal. This is also untrue. The expansion of claims was merely to reinstate the entire claim based upon the holding of this Court that the District Court had erroneously applied the wrong statute of limitations. Moreover, the expansion was done pursuant to Behrens own stipulation

acknowledging that the District Court's order was erroneous. (A copy of this stipulation is attached hereto.) Behrens should not be permitted to stipulate to an expansion and then assert that this provides him with a new basis for a third interlocutory appeal.

The true issue before this Court is whether Pelletier's day in Court is to be delayed another two years by repeated interlocutory appeals by Behrens. This Court has held that one interlocutory appeal is enough.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not. *Abel, supra* at 396.

Behrens suffers no real prejudice by the granting of this motion. Behrens has already had one interlocutory appeal. Behrens will be permitted to appeal the final judgment. One interlocutory appeal is legally sufficient in this case.

DATED: November 16, 1994

SAMUEL T. REES
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By /s/ Samuel T. Rees
SAMUEL T. REES

Attorneys for ROBERT J. PELLETIER

[Supplemental Declaration Of Samuel T. Rees Omitted In Printing]

[Exhibits Omitted In Printing]

[Proof Of Service Omitted In Printing]

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No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court held that in civil rights actions against individual government officials, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final decisions under 28 U.S.C. § 1291. The Court of Appeals for the Ninth Circuit dismissed, for lack of jurisdiction, petitioner's appeal of a summary judgment order denying his qualified immunity claim, solely because petitioner had previously appealed the denial of a motion to dismiss on immunity grounds. The case therefore presents the following question:

Whether the court of appeals lacks jurisdiction over a government official's interlocutory appeal of a summary judgment order denying a claim of qualified immunity solely because the official had previously appealed a denial of immunity at the motion to dismiss stage.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 2

A. The *Bivens* Action 4

B. The First Interlocutory Appeal 6

C. The Second Interlocutory Appeal 9

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE ONE-APPEAL RESTRICTION BREAKS THE BACK OF THE QUALIFIED IMMUNITY DEFENSE 13

A. This Court Has Consistently Held That Qualified Immunity Is A Full Immunity From Suit Which Must Be Established As Early As Possible To Achieve Its Purpose 13

B. The One-Appeal Rule Routinely Compels Defendants To Delay Appealing Immunity Denials Until The Eve of Trial 17

C. As Seventy Percent Of Interlocutory Appeals From Orders Denying Qualified Immunity Result In Reversal, Regular Deferral Of Appeals Will Mean Routine Loss Of Valid Immunity Entitlements ... 20

TABLE OF CONTENTS – Continued

Page

II. A JURISDICTIONAL BAR AGAINST ALL SECOND INTERLOCUTORY IMMUNITY APPEALS IS DIRECTLY AT ODDS WITH *MITCHELL V. FORSYTH* 24

III. THE ONE-APPEAL RULE CONTRAVENES GOVERNING CASE LAW ON THE COLLATERAL ORDER DOCTRINE 27

A. This Court Has Held That For Purposes Of The Collateral Order Doctrine, The Category Of Appealable Decisions Consists Of Orders Denying Qualified Immunity Claims 27

B. No Collateral Order Principle Supports A Rigid Distinction Between First And Second Qualified Immunity 29

IV. CONGRESS HAS COMMITTED EXCLUSIVELY TO THIS COURT THE POWER TO MAKE JUDICIAL RULES WHICH "DEFINE OR REFINE" INTERLOCUTORY APPEALABILITY..... 36

CONCLUSION 40

APPENDIX 1A

TABLE OF AUTHORITIES

Page

CASES

Abel v. Miller, 904 F.2d 394 (7th Cir. 1990).... 16, 20, 26

Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993)..... 33

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).....11, 26

Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971)..... *passim*

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).....12, 15, 28, 31, 32

Digital Equipment v. Desktop Direct, Inc., 114 S.Ct. 1992 (1994).....11, 12, 27, 28, 32

Forsyth v. Kleindienst ("Forsyth I"), 599 F.2d 1203 (3d Cir. 1979) 24

Forsyth v. Kleindienst ("Forsyth II"), 700 F.2d 104 (3d Cir. 1983) 16, 25, 26

Forsyth v. Kleindienst ("Forsyth III"), 729 F.2d 267 (3d Cir. 1984) 25

Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991)..... 8

FSLIC v. Fitzpatrick, No. CV 86-6780 (C.D. Cal. 1990)..... 5

Gillespie v. United States Steel Corp. 379 U.S. 148 (1964)..... 15

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)..... 32

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Hemphill v. Kincheloe, 987 F.2d 589 (9th Cir. 1993) 34

Hunter v. Bryant, 502 U.S. 224 (1991) 10, 15

Johnson v. Jones, 115 S.Ct. 2151 (1995) ..... *passim*

Jones v. Johnson, 26 F.3d 727 (7th Cir. 1994)..... 30

Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir. 1988)..... *passim*

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)..... 16

Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992)..... 16

Leatherman v. Tarrant Narcotics Unit, 113 S.Ct. 1160 (1993) 31

Mitchell v. Forsyth, 472 U.S. 527 (1985) ..... *passim*

Murphy v. Morris, 849 F.2d 1101 (8th Cir. 1988)..... 16

Nelson v. Silverman, 999 F.2d 417 (9th Cir. 1993).....*passim*

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 2

Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993) 38

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992)..... 9, 21, 32

Siegert v. Gilley, 500 U.S. 226 (1992)....8, 15, 17, 23, 38

Swint v. Chambers County Commission, 115 S.Ct. 1203 (1995)..... *passim*

Thomas v. Arn, 474 U.S. 140 (1985) 13, 37

United States v. MacDonald, 435 U.S. 850 (1978)..... 28

TABLE OF AUTHORITIES – Continued

Page

Willy v. Coastal Corp., 503 U.S. 131 (1992) 37

Wyatt v. Cole, 504 U.S. 158 (1992) 10, 19, 28

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(b) 36

28 U.S.C. § 2072 ..... 12, 37

28 U.S.C. § 2072(c) 36

28 U.S.C. § 2679 6

RULES

Federal Rules of Appellate Procedure, Rule 38 38

United States Court of Appeals for the Ninth Circuit, Circuit Rule 34-4 38

REFERENCES

15 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977) § 3993 38

15A C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1992) § 3914.10 38

Judicial Business of the United States Courts, Report of the Director (1994) 22

Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165 (1990) 11, 21, 22

No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a) is unreported. A prior and related opinion of the court of appeals in this case (Pet. App. 10a-33a) is reported at 968 F.2d 865. The opinion of the district court denying petitioner's motion for summary judgment on the ground of qualified immunity (Pet. App. 2a-7a) is unreported.

JURISDICTION

The court of appeals entered its order summarily dismissing petitioner's appeal on November 17, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on January 20, 1995, and was granted on March 27, 1995. The Court has jurisdiction under 28 U.S.C. § 1254(1). Certiorari jurisdiction under § 1254(1) includes jurisdiction to review an order of the court of appeals dismissing an interlocutory immunity appeal for lack of jurisdiction. *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

STATUTORY PROVISION INVOLVED

Petitioner's appeal was dismissed on the ground that the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, as construed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Pet. App. 1a. Section 1291 states in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . . "

STATEMENT

Petitioner John Behrens, presently an employee of the federal Office of Thrift Supervision, served for several years as a designated supervisory agent for the Federal Home Loan Bank Board. In 1989 Behrens was sued by respondent Robert Pelletier for advising a federally insured savings institution that the Bank Board could not proceed to approve Pelletier as the institution's managing

officer until federal regulators had completed a pending investigation of Pelletier's role in the failure of another thrift that had previously employed him. Behrens' statement respecting the investigation was indisputably true; the action he took was not only reasonable on its face but in complete compliance with regulatory policy. Seven years later, Behrens is still entangled in *Bivens* litigation initiated by Pelletier.[1] The district court denied both a dismissal and a later summary judgment motion based on the defense of qualified immunity without providing an immunity analysis or indeed using the word "immunity" in either of the two orders. On Behrens' appeal from the district court's adverse dismissal decision, the Ninth Circuit chose to accept a "complaint [which] raises at most nebulous theories of conspiracy" as adequate pleading, although noting that it was plainly "insufficient to survive a motion for summary judgment." When the district court denied the subsequent summary judgment motion, Behrens again appealed on the ground that the facts alleged and adduced by Pelletier showed no unreasonable violation of clearly established law. The Ninth Circuit dismissed the appeal, retroactively applying to Behrens a circuit rule prohibiting jurisdiction over any second pretrial immunity appeal regardless of the issue presented. This Court granted certiorari to decide whether, in view of the Court's decision in *Mitchell v. Forsyth*, the court of appeals may refuse jurisdiction over

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[1] *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Behrens' appeal from the denial of his summary judgment motion solely because he took an earlier appeal from the denial of his motion to dismiss.

A. The *Bivens* Action

Pioneer Savings was a California-chartered institution which applied to the Federal Home Loan Bank Board in 1984 for federal insurance of its accounts. Pet. App. 11a. The Bank Board, the federal agency then responsible for regulating savings and loan associations, granted the application conditionally: it expressly required Pioneer to "provide for the employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent." Pet. App. 12a n.2. Pioneer hired Pelletier as its managing officer in March 1985, then requested the necessary Bank Board approval.

Pelletier previously had been senior vice president of another thrift, Beverly Hills Savings and Loan Association, where he supervised the major loan division and was a member of the Senior Loan Committee. Pet. App. 12a. Shortly after Pelletier began his employment with Pioneer, the Bank Board declared Beverly Hills Savings insolvent and placed it in receivership. Pet. App. 12a. The Bank Board and the Federal Savings and Loan Insurance Corporation then commenced an investigation of the activities of several of the failed institution's senior officers, including Pelletier. Pet. App. 12a-13a.

Petitioner John W. Behrens was the Bank Board's designated supervisory agent for certain savings and loan associations in the Eleventh District, one of them Pioneer Savings. Pet. App. 13a n.4. As supervisory agent, Behrens

notified Pioneer's board of directors by letter dated May 8, 1986 that the Bank Board could not proceed with Pioneer's pending application for approval of Pelletier's employment until the regulatory investigation into his conduct at Beverly Hills Savings was completed.[2] Upon

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[2] The full text of Behrens' May 8, 1986 letter, set out in the Ninth Circuit's published opinion on the prior Behrens appeal, is as follows:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in this regard.

Pet. App. 13a. That Behrens' statement regarding the FSLIC investigation was true is not and never has been disputed by Pelletier. The regulatory investigation ultimately resulted in a suit by FSLIC against Pelletier and other Beverly Hills Savings officers, *FSLIC v. Fitzpatrick*, No. CV 86-6780 (C.D. Cal. 1990), for breach of fiduciary duty, negligence and other misconduct. J.A. 12. The current action was originally filed as a third-party claim in that litigation.

receipt of Behrens' letter, Pioneer's directors asked Pelletier to resign, then fired him when he refused. Pet. App. 14a. Pelletier's lawsuit against Behrens, the Bank Board and the United States followed. J.A. 7.

Pelletier's *Bivens* claims against Behrens fall into two groups involving related factual predicates. One group is based on the May 1986 letter from Behrens to Pioneer which Pelletier contends resulted in termination of his employment. J.A. 12. The other involves what the court of appeals characterized as "nebulous theories of conspiracy" to prevent Pelletier, after termination, from obtaining a similar position elsewhere. J.A. 13; Pet. App. 22a. In May 1989, Behrens moved to dismiss all the *Bivens* claims, asserting a statute of limitations defense and, alternatively, a qualified immunity defense. Pet. App. 14a. At the same time, Behrens filed a request under the Westfall Act, 28 U.S.C. § 2679, to substitute the United States as defendant in place of Behrens on parallel common law tort claims. Pet. App. 15a.

In an October 5, 1989 order issued without a memorandum opinion, the district court dismissed the job-termination claims as time-barred, but left standing the claims based on alleged interference with Pelletier's search for other employment. J.A. 46-50. The order did not address the Westfall Act substitution issue, nor did it make any specific reference at all to the qualified immunity defense that was the heart of the motion. J.A. 46-50.

B. The First Interlocutory Appeal

In November 1989, Behrens filed a pretrial appeal of the district court's order. J.A. 42-44. Behrens asserted the

court had erred in failing to dismiss the *Bivens* interference claims on the ground of qualified immunity, and in failing to approve Westfall Act substitution on the common law tort claims.[3]

The Ninth Circuit's June 1992 opinion on the first interlocutory appeal acknowledged that under *Mitchell v. Forsyth*, orders denying dismissal and orders denying summary judgment on qualified immunity claims are both appealable final orders. Pet. App. 17a. However, the appellate court chose to make Behrens' initial immunity appeal the vehicle for imposing a substantial restriction on *Mitchell* appeal rights in the Ninth Circuit. The panel announced: "If the district court determines that a defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril," because the court of appeals will refuse to hear a second pretrial appeal at the summary judgment stage. Pet. App. 17a-19a.

After stating its new one-appeal limitation, the appellate panel proceeded to review the denial of Behrens'

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[3] At oral argument the court of appeals noted that it could not determine from the district court's terse order whether the court had even considered the Westfall Act substitution issue. Pet. App. 16a. The panel therefore vacated submission of the appeal and remanded the case for the limited purpose of obtaining a clear ruling. Pet. App. 16a. After the district court entered an order denying Westfall substitution, the panel reinstated the appeal and issued its opinion on both the immunity and the substitution issues. Pet. App. 16a. Reversing the denial of substitution, the court of appeals held that all of Behrens' alleged activities, including the May 8, 1986 letter, were within the scope of his employment as a federal official. Pet. App. 32a.

motion to dismiss the interference claims on immunity grounds. Pet. App. 20a-24a. It concluded that the "nebulous theories of conspiracy" alleged in Pelletier's complaint were adequate for pleading purposes, but would not survive a summary judgment motion based on the qualified immunity defense. Pet. App. 22a. Further, the panel observed in a footnote that the district court had applied the wrong statute of limitations to Pelletier's job-termination claims. Pet. App. 15a n.6. Although the dismissal of the job-termination claims had not been appealed and they were not before the appellate court in any form, the court's comment effectively revived them. Pet. App. 3a. The panel suggested that summary judgment should easily dispose of those claims as well.[4]

Behrens immediately sought rehearing, principally to urge that the one-appeal discussion be omitted from the opinion as dictum. J.A. 269-81. The petition for rehearing also pointed out that the panel's single-appeal pronouncement directly conflicted with another published Ninth Circuit opinion: in *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir. 1991), a different panel had expressly noted that a *Bivens* defendant is entitled to two interlocutory immunity appeals. J.A. 278-81. The *Pelletier* panel denied rehearing on September 24, 1993. J.A. 282. The court of

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[4] The court of appeals noted that the Ninth Circuit had never decided whether private employment contingent on regulatory approval, like Pelletier's job with Pioneer, involves any constitutionally protected interest. Pet. App. 21a. In short, the panel directed the district court's attention to the absence of any "clearly established constitutional right" supporting the newly resurrected job-termination claims. *Siegert v. Gilley*, 500 U.S. 226 (1992).

appeals decision was then published. *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992); Pet. App. 10a-33a.

C. The Second Interlocutory Appeal

Litigation resumed, and after submitting to full discovery Behrens made the summary judgment motion the appellate opinion had indicated should resolve the immunity issues in his favor. J.A. 283-309. In September 1994, without oral argument, opinion or analysis, the district judge denied Behrens' summary judgment motion as to all claims, including the job-termination claims excluded from the previous appeal. Pet. App. 5a-6a. Like the earlier dismissal order, the order denying summary judgment never mentions qualified immunity, and offers no indication that the court in fact undertook any immunity analysis at all. Pet. App. 2a-7a. The case was then set for jury trial on May 16, 1995. J.A. 5.

Behrens filed a timely notice of appeal under 28 U.S.C. § 1291. J.A. 5. Pelletier moved to dismiss the appeal for lack of jurisdiction, claiming the earlier appellate decision was dispositive on the jurisdictional issue. J.A. 373-83. On November 17, 1994, a Ninth Circuit motions panel entered a summary dismissal order citing *Nelson v. Silverman*, 999 F.2d 417, 418-19 (9th Cir. 1993). Pet. App. 1. The *Nelson* decision, rendered after *Pelletier v. FHLB-SF*, declared the one-appeal rule a "categorical" one admitting of no exceptions and dismissed a second appeal for lack of jurisdiction. In the same order, the court of appeals denied a stay pending application for a writ of certiorari. Pet. App. 1a.

On January 20, 1995 Behrens filed a petition for a writ of certiorari and an application for a stay of proceedings in the district court. The stay was granted on February 21, 1995, and the writ of certiorari on March 27, 1995.

SUMMARY OF ARGUMENT

The Ninth Circuit's rule prohibiting on jurisdictional grounds any second pretrial qualified immunity appeal is misdirected, arbitrary in its effect, and at odds with this Court's case law on both the qualified immunity and the collateral order doctrines.

1. To insure that government defendants realize the benefit of the qualified immunity defense before it is lost in on-going litigation, the Court formulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), an "objectively-determined immediately-appealable immunity from suit." *Wyatt v. Cole*, 504 U.S. 158, 166 (1992). *Harlow* expressly tailored qualified immunity as an objective defense to be resolved by pretrial motion, and the later decisions of the Court "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). The one-appeal rule effectively destroys qualified immunity *as an immunity from suit*. When the key to the court of appeals' gate will turn only once, prudence dictates that it be used not as early as possible in the case but as late as possible – literally in the last hour before trial, when pretrial protection has been irretrievably lost.

Further, empirical evidence indicates that approximately 70% of the pretrial appeals from district court orders denying qualified immunity are successful. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1189-90 (1990). Thus, the abuse of the judicial system that is the Ninth Circuit's stated reason for the one-appeal rule appears to be a misperception; and the coerced deferral of appellate review which is a principal feature and purpose of the rule will exact an extremely high price in valid immunity entitlements lost to delay.

2. The legal predicate for the restriction, the theory that a defendant's first pretrial appeal on any immunity issue exhausts the jurisdiction of the courts of appeals under the collateral order doctrine, is erroneous. It cannot be reconciled with this Court's decision in *Mitchell v. Forsyth*, which was itself a second immunity appeal, and which was reviewed by this Court under certiorari jurisdiction predicated upon the existence of second-appeal jurisdiction in the court of appeals below. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

3. The one-appeal rule abridges, on economy and efficiency grounds, the appealable-order class this Court described in *Mitchell*. To the extent the concerns expressed by the court of appeals reflect more than a mistaken belief that frivolous appeals predominate in immunity cases, those concerns do not outweigh prompt enforcement of the qualified immunity entitlement. As the Court recently confirmed, collateral orders are designated appealable or nonappealable by category, with categories determined at the level of the right asserted. *Digital Equipment v. Desktop Direct, Inc.*, 114 S.Ct. 1992,

1996 (1994). The right to immediate review of an order denying qualified immunity is a function of the stature of the immunity entitlement itself, its "good pedigree in public law" and sound policy base. *Id.* at 2000-01. Petitioner Behrens' current appeal raises core immunity issues that place it squarely within the *Mitchell* definition of an appealable qualified immunity order: whether Behrens' conduct, as defined by the post-discovery record, constitutes an unreasonable violation of clearly established law. The substance of the immunity claim denied by the district court's erroneous summary judgment order is not altered by the fact that Behrens previously appealed an adverse dismissal order; nor is the order appealed less final by any collateral-order test because it is challenged on a second appeal.

While the sometimes cumbersome nature of the pretrial review process may counsel against expanding the *Mitchell* appealable-order category, *Johnson v. Jones*, 115 S.Ct. 2151 (1995), it is not a ground for denying immediate appeal on those definitive qualified immunity issues *Mitchell* held " 'too important to be denied review.' " *Mitchell*, 472 U.S. at 524 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546); *see Johnson*, 115 S.Ct. at 2155.

4. Finally, a categorical one-appeal limitation imposed at the court of appeals' level impermissibly encroaches upon the authority Congress has granted this Court to "define or refine when a district court ruling is 'final' and when an interlocutory order is appealable" through the rulemaking process provided in 28 U.S.C. § 2072. *Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1211 (1995). The Ninth Circuit's own power to

promulgate circuit procedural rules does not extend to a rule that is explicitly jurisdictional in purpose and effect, as the single-appeal restriction is. *Thomas v. Arn*, 474 U.S. 140, 146 (1985). If additional controls on pretrial immunity appeals are desirable, the statutory rules procedure designated by Congress and supervised by this Court is a far more appropriate means than the Ninth Circuit's arbitrary and analytically flawed one-appeal rule.

ARGUMENT

I. THE ONE-APPEAL RESTRICTION BREAKS THE BACK OF THE QUALIFIED IMMUNITY DEFENSE

A. This Court Has Consistently Held That Qualified Immunity Is A Full Immunity From Suit Which Must Be Established As Early As Possible To Achieve Its Purpose

The Court has labored steadily since 1982 to construct a qualified "immunity from suit" with three components: protection from liability, trial, and pretrial burdens such as discovery. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 525-29 (1985). In *Harlow*, the Court concluded that the subjective good faith immunity available to public officials under the common law entailed unacceptably high social costs. Scrutinizing the thought processes behind official judgment calls involved detailed inquiry into motives and a full jury trial to resolve the good faith issues. The inevitable result, as civil rights suits lumbered through depositions, motions and trial, was "distraction of officials from their governmental duties, inhibition of discretionary

action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Of particular concern to the Court was the kind of "broad-ranging discovery . . . [that] can be peculiarly disruptive of effective overnment." *Harlow*, 457 U.S. at 817.

To achieve a workable balance between the legitimate claims of civil rights plaintiffs and the public's interest in the smooth functioning of its government, the Court stripped the qualified immunity defense of the subjective elements that routinely required jury determination. Since *Harlow*, an official's entitlement to qualified immunity turns on the "objective reasonableness of [his] conduct, as measured by reference to clearly established law," a formulation designed to immunize all government defendants save those who have committed a clear violation of "basic, unquestioned constitutional rights." *Harlow*, 457 U.S. at 818, 815. *Harlow*'s stated purpose was to transform qualified immunity from a triable defense to a question of "objective legal reasonableness" properly disposed of by pretrial motion. *Harlow*, 457 U.S. at 818-19. The Court expressly held: "Until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818.

Three years after *Harlow*, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court confirmed that qualified immunity is not a mere shield against liability but a full immunity from suit which encompasses the "right not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526-27. As such, qualified immunity is steadily eroded and eventually lost irretrievably as litigation progresses. The Court therefore held that when qualified

immunity is denied, immediate appellate access is essential to prevent immunity protection from being destroyed before it can be vindicated: "[D]enial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets" the traditional *Cohen* tests for treating an order as " 'final' within the meaning of § 1291." *Mitchell*, 472 U.S. at 527, 524, *citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). In sum, dismissal and summary judgment orders are equally appealable so long as they reflect a refusal to afford immunity as a matter of law. *Mitchell*, 472 U.S. at 527-30.

The Court's later qualified immunity decisions have adhered firmly to the *Harlow/Mitchell* principle that immunity should be asserted and established as early as possible in the litigation process, because "even such pretrial matters as discovery are to be avoided if possible." *Mitchell*, 472 U.S. at 526; *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, the majority in *Anderson v. Creighton* described dismissal or summary judgment prior to any substantial discovery as "the driving force behind Harlow[ ]." *Anderson*, 483 U.S. at 640 n.2, 646 n.6. The dissenting Justices agreed that the defense should be determined "not only in advance of trial, but *of equal importance*, before the time-consuming pretrial discovery process commence[s]." *Anderson*, 483 U.S. at 650 (Stevens, J., joined by Brennan, J. and Marshall, J., dissenting) (emphasis added); *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (one purpose of immunity is to "spare a defendant

. . . unwarranted demands customarily imposed upon those defending a long drawn out lawsuit").[5]

In the context of the Court's consistent emphasis on the importance of pretrial immunity protection, the most straightforward reading of *Mitchell v. Forsyth* is that a civil rights defendant may take two interlocutory immunity appeals: once at the pleading stage, before discovery protection is invaded; and again, if necessary, on a developed factual record before the case is consigned to trial. *Mitchell*, 472 U.S. at 526. Three circuit courts of appeal have so construed *Mitchell*.[6] The Ninth Circuit and two others, however, interpret *Mitchell* as identifying several opportunities for immediate appeal but permitting use of the appeal right only once. Pet. App. 17a-18a; *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990); *Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988).

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[5] *Anderson* also made it clear that discovery protection extends not merely to the state of mind evidence *Harlow* focused on, but to hard factual evidence as well. 483 U.S. at 637-38 (facts that gave rise to probable cause conclusion).

[6] *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (civil rights action involving immunity defense may give rise to "not one but two interlocutory appeals"); *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988) (limiting defendant to one appeal "would undercut the value of the . . . immunity defense"); *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) ("It is generally understood that *Mitchell* contemplates appeals from denials of immunity at either or both of these stages in civil rights proceedings") (dictum). The Third Circuit, which recently produced *Kulwicki*, previously held in *Forsyth v. Kleindienst*, 700 F.2d 104, 105 (3d Cir. 1983), that it had jurisdiction over a second interlocutory appeal of absolute immunity.

The one-appeal rule is framed as an inflexible jurisdictional bar. *E.g., Nelson v. Silverman*, 999 F.2d at 419. That construction of *Mitchell* destroys the pretrial protection at the core of qualified immunity: it effectively insures that a defendant who loses a prompt motion to dismiss will permanently forfeit his pretrial immunity entitlement, even when the ruling is plainly wrong, because he cannot afford to risk his single appeal early in the case.

B. The One-Appeal Rule Routinely Compels Defendants To Delay Appealing Immunity Denials Until The Eve of Trial

Under the one-appeal rule, the substantive immunity entitlement becomes a hostage to litigation strategy decisions. Determining whether there has been an unreasonable violation of settled law requires some factual context both to identify the governing law and to evaluate objective reasonableness. *E.g., Anderson*, 483 U.S. at 641 (reasonableness is "objective (albeit fact-specific)"). How much context is necessary is often difficult to judge. *See Siegert v. Gilley*, 500 U.S. at 285 (district court erred in requiring "more developed record" for immunity analysis). A defendant who believes he can prevail even on the facts pleaded in the plaintiff's complaint will make the early motion to dismiss encouraged by *Harlow* and *Mitchell*. Dismissal will be denied if the district court believes either that the allegations, if proved, preclude immunity; or that objective reasonableness cannot be determined without more specific factual data. *See Mitchell*, 472 U.S. at 527-28. For the defendant, the adverse

ruling means months or even years of continued litigation and discovery unless he invokes his interlocutory appeal right. However, in the Ninth Circuit he exercises that right, in the court of appeals' candid phrase, "at his peril." Pet. App. 19a.

The defendant's peril, however, is also the peril of his office, his professional colleagues and the integrity of governmental functions he performs. Should the defendant appeal the denial of his motion to dismiss, his risk is that the court of appeals will decide he miscalculated the degree of factual specificity necessary for a decision in his favor. The result of his strategic error is both harsh and arbitrary: a later summary judgment order erroneously denying immunity on the developed factual record and sending him to trial is appeal-proof, no matter how clearly erroneous the denial may be.

Only the rashly confident defendant, or the foolhardy, would consider taking up the Ninth Circuit's gauntlet. The one realistic course open to a *Bivens* defendant whose motion to dismiss is wrongly denied is to forego the appeal unless and until trial is imminent. In the interim, the official himself, his office and his professional associates are subjected to intimidating depositions, disruptive document production and time-consuming pretrial litigation entanglements that should have been averted.

Delaying appeal until the eve of trial, when pretrial immunity has been irreparably lost, is not merely an unfortunate side effect of the one-appeal rule. It is the aim. See Pet. App. 19a; *Kaiter v. Town of Boxford*, 836 F.2d at 708 (single appeal may be taken only when "trial is

. . . inevitable"). In short, while the driving force behind *Harlow/Mitchell* immunity is termination of doomed lawsuits before the immunity defense has lost its value, the Ninth Circuit has said: Appeal your immunity claim before discovery is closed and the trial date set if you dare.

As significantly, the federal benches that have adopted a one-appeal rule are forcing individual defendants to pick and choose among the elements of a unified defense that was created for the benefit of the public, not primarily for the benefit of the individual. *Wyatt v. Cole*, 504 U.S. 158, 163 (1992) ("the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents"). The Ninth Circuit, for example, stated that petitioner Behrens was free to elect between an immediate appeal of the order denying dismissal, and a delayed, post-discovery appeal at the summary judgment stage: "Behrens has chosen the former route. We affirm his right to make that choice." Pet. App. 19a; *see also Kaiter*, 836 F.2d at 708 (defendant may elect immediate, pre-discovery appeal if he expressly "waives any right to file additional interlocutory appeals").

Behrens in fact was given no such choice. The strategic decision to burn Behrens' bridge to the appellate court was made by the Ninth Circuit, which inserted its one-appeal restriction in the opinion resolving his first appeal. However, even if Behrens had been warned in advance that immediate defense of his immunity claim at the motion to dismiss stage would put his ultimate trial protection at risk, more is at stake than an individual's

personal preference. Whether and to what extent government operations shall be shielded from intrusive pretrial litigation burdens is not wholly a private consideration. The Court made that decision in *Harlow* on the basis of the broader public interest at stake, and the balance achieved there should not be restruck in every *Bivens* case by each individual defendant. That, however, is a practical effect of the one-appeal rule.

The Ninth Circuit's rule limiting government officials to one pretrial immunity appeal effectively edits pretrial protection out of this Court's articulation of qualified immunity, and frustrates the *Harlow/Mitchell* policy that valid immunity entitlements be enforced before they are lost.

C. As Seventy Percent Of Interlocutory Appeals From Orders Denying Qualified Immunity Result In Reversal, Regular Deferral Of Appeals Will Mean Routine Loss Of Valid Immunity Entitlements

The damage the one-appeal rule inflicts on the qualified immunity doctrine is not merely theoretical. Empirical evidence suggests that the coerced deferral of immunity appeals effected by the rule will result in frequent, arbitrary loss of valid immunity rights.

The rationale for the one-appeal rule consists in large measure of the courts of appeals' frankly stated suspicion that pretrial immunity appeals are frequently misused. *E.g.*, Pet. App. 18a-19a; *Nelson v. Silverman*, 999 F.2d at 419; *Kaiter v. Town of Boxford*, 836 F.2d at 708; *Abel v. Miller*, 904 F.2d at 397. The Ninth Circuit's explicit

assumption in *Pelletier* and *Nelson* was that "the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard for the Court's intent in creating the qualified immunity doctrine." Pet. App. 17a-19a. The Ninth Circuit concluded, therefore, that "limiting defendants to one bite at the apple will [not] be 'peculiarly disruptive of effective government.' " Pet. App. 19a, *quoting Harlow v. Fitzgerald*, 457 U.S. at 817.

In fact, an examination of the appellate reversal rate for district court orders denying qualified immunity indicates that erroneous denials are the rule rather than the exception. A 1990 law review article by Professor Michael E. Solimine compared the federal appellate courts' general reversal rate for appeals decided on the merits with the reversal rate on interlocutory appeal of pretrial orders denying qualified immunity in civil rights cases. Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1189-90 (1990). Professor Solimine used figures from the Administrative Office of the United States Courts for the overall appellate reversal rate – 13.8% for appeals terminated on the merits in 1989 – and interlocutory immunity appeal data obtained from a Lexis search. He found that of the interlocutory orders denying qualified immunity reviewed by the courts of appeals in published decisions during the three-year period from 1987 through 1989, *"approximately 70% were reversed in whole or in part – a figure almost five times the ordinary reversal rate for all appeals of final decisions on the merits."* Solimine, *supra*, at 1190 (emphasis added).

Although the interlocutory appeal cases he examined all post-dated *Harlow* by five to seven years, Professor Solimine speculated that the extraordinarily high reversal rate might decrease as additional appellate precedent was generated and the district courts became more familiar with legal standards for qualified immunity motions. *Id.* However, figures for 1994 reveal little change, if any, in the ensuing five years. The Administrative Office's annual report for 1994 places the general reversal rate for appeals terminated on the merits at 10.4%, with civil matters in the 14% range. *Judicial Business of the United States Courts, Report of the Director* (1994), Table B-5, p. A-9 (App. 1a). Conducting the same Lexis search for the year 1994 that Professor Solimine used for 1987-1989 reveals that in published opinions on the merits from the federal courts of appeals, interlocutory orders denying qualified immunity were wholly or partially reversed 70% of the time; including unreported opinions yields a 60% reversal rate. Finally, appeals of orders denying dismissal (the group that the one-appeal rule effectively abolishes) have a reversal rate of 70% – about five times the general civil figure, and seven times the overall rate.[7]

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[7] Professor Solimine's Lexis search request was: Qualif! w/2 immunity w/5 den! and collateral or interlocutory or Mitchell and date bef Jan 1 1990 and date aft Jan 1 1987. He discarded 66 of the 200 cases found because they did not reflect a decision on the merits of the immunity issue. Solimine, *supra*, at 1189 n.136. The 1994 data in the text was obtained by running the same search with the date parameters adjusted to "date (aft 1993 and bef 1995)." The library used was Genfed and the file USApp. The search generated 107 cases. Twenty-one were eliminated because they were not defendants' appeals decided on the merits of the immunity issue, yielding a 60% reversal rate.

In sum, qualified immunity is an area where, in the judgment of the courts of appeals, the district courts err substantially more often than not. To strip trial immunity from defendants who take a pre-discovery appeal and send them to trial on summary judgment orders, more likely than not to be erroneous, frustrates in a wholly arbitrary manner the immunity doctrine articulated by this Court. Moreover, immunity claimants who yield to the pressure of the rule and defer their one appeal until the eve of trial will, in most cases, have endured precisely the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit" that the immunity protection to which they were legally entitled should have spared them. *Siegert*, 500 U.S. at 232. An inflexible jurisdictional rule limiting civil rights defendants to one interlocutory immunity appeal literally breaks the back of the qualified immunity defense.

Another 26 can be eliminated because they were designated not to be published, yielding a 70% reversal rate. As Professor Solimine cautions, the resulting figures probably are not exact for a number of reasons related to the lack of specificity of portions of the data. See Solimine, *supra*, at 1189 n.137. It should also be noted that the general reversal figures provided by the Administrative Office of the United States Courts appear to include interlocutory appeals decided on the merits. Inclusion of interlocutory immunity appeals would skew the general rate upward slightly, understating the real gap between general reversal and interlocutory immunity reversal rates.

II. A JURISDICTIONAL BAR AGAINST ALL SECOND INTERLOCUTORY IMMUNITY APPEALS IS DIRECTLY AT ODDS WITH *MITCHELL V. FORSYTH*

The premise of the one-appeal rule, that no court of appeals jurisdiction lies under 28 U.S.C. § 1291 for any second interlocutory immunity appeal, is inconsistent with both the reasoning and the procedural posture of the case that established the immediate appealability of qualified immunity claims, *Mitchell v. Forsyth*.

The *Mitchell* case had its origin in a civil rights suit against former Attorney General John Mitchell and others, alleging illegal use of wiretaps. Mitchell initially appealed to the Third Circuit a district court order denying his motion for summary judgment on defenses of both absolute and qualified immunity. *Forsyth v. Kleindienst* (*"Forsyth I"*), 599 F.2d 1203, 1205-06 (3d Cir. 1979); see *Mitchell v. Forsyth*, 472 U.S. at 516. The court of appeals dismissed the appeal as to qualified immunity on the ground that it was not an appealable order, but heard and decided the absolute immunity appeal. The case was then remanded to the district court for further consideration on an augmented factual record. *Forsyth I*, 599 F.2d at 1217.

In the trial court once more, Mitchell filed another summary judgment motion, again asserting absolute and qualified immunity. The district court denied the motion on both issues. *Mitchell v. Forsyth*, 472 U.S. at 516-17. In the words of this Court, "Mitchell again appealed, contending that the District Court had erred in its rulings on

both absolute immunity and qualified immunity." *Mitchell*, 472 U.S. at 517.

The second interlocutory appeal was referred initially to a Third Circuit motions panel for resolution of jurisdictional and stay issues. *Forsyth v. Kleindienst* ("*Forsyth II*"), 700 F.2d 104 (3d Cir. 1983). Although the panel majority found jurisdiction over the absolute immunity appeal, it did so in the face of a forceful dissent from Judge Sloviter protesting the "grant of interlocutory review to Mitchell *a second time* under the collateral order doctrine." *Id.* at 109 (emphasis added). The focus of the dissent's objection was that Mitchell was seeking review of the same facts and legal issues considered on the first appeal. *Id.* at 106, 110. Citing both judicial economy and the limits of the collateral order doctrine, Judge Sloviter argued strongly that the court of appeals lacked § 1291 jurisdiction over Mitchell's second immunity appeal, and should dismiss it as "frivolous in light of the Third Circuit's earlier consideration of the same issue." *Id.* at 106-110; *Mitchell v. Forsyth*, 472 U.S. at 518 n.3. The second immunity appeal was transferred from the motions panel to a merits panel, which subsequently issued a decision adverse to Mitchell. *Forsyth v. Kleindienst* ("*Forsyth III*"), 729 F.2d 267 (3d Cir. 1984).

On certiorari, the Court carefully acknowledged both the status of the appeal as a second one, and the jurisdictional objection below. *Mitchell*, 472 U.S. at 517, 518 n.3. If the jurisdictional proposition embodied in the one-appeal rule were correct, Mitchell's initial absolute immunity appeal would have exhausted the interlocutory-appeal jurisdiction of the Third Circuit and fenced the case out of the court of appeals with respect to *all* immunity issues,

absolute or qualified.[8] This Court would then have been obliged to note a defect in its own certiorari jurisdiction:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. . . . "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (brackets in original, citations omitted); *see Swint v. Chambers County Commission*, 115 S.Ct. 1203, 1206 (1995) (Supreme Court will not reach the merits if the court of appeals lacked jurisdiction).

In fact, the Court decided the *Mitchell* absolute immunity appeal on the merits, implicitly affirming the conclusion of the *Forsyth II* majority that § 1291 jurisdiction over the second interlocutory immunity appeal properly lay in the court of appeals. Moreover, after it disposed of absolute immunity, the Court conducted an intensive examination of the appealability of qualified

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[8] *See Kaiter v. Town of Boxford*, 836 F.2d at 707 (absolute and qualified immunity are not only subject to the same appeal rules but must both be raised in the same single appeal); *Abel v. Miller*, 904 F.2d at 397 (appellate courts are limited to "[o]ne full and fair review on the question 'shall there be a trial?' ").

immunity claims. It concluded that a qualified immunity defense which shares the essential attributes of absolute immunity must be appealable on the same basis as absolute immunity. *Mitchell*, 472 U.S. at 525-30. Nowhere in its analysis did the Court state or suggest that the jurisdiction the Third Circuit exercised over a second absolute immunity appeal would not exist if the two appeals had involved only qualified immunity.

It may fairly be said that *Mitchell* did not expressly state whether qualified immunity is appealable once or twice, only that it is appealable. However, what the Court did with the second pretrial immunity appeal in *Mitchell* cannot be reconciled with the jurisdictional analysis underlying the Ninth Circuit's one-appeal rule.

III. THE ONE-APPEAL RULE CONTRAVENES GOVERNING CASE LAW ON THE COLLATERAL ORDER DOCTRINE

A. This Court Has Held That For Purposes Of The Collateral Order Doctrine, The Category Of Appealable Decisions Consists Of Orders Denying Qualified Immunity Claims

The one-appeal rule formulated by the Ninth Circuit bars all second immunity appeals as a class. *Nelson v. Silverman*, 999 F.2d at 419. The categorical approach to appealability adopted in *Nelson* is fundamentally sound, as this Court has recently confirmed. *Digital Equipment v. Desktop Direct, Inc.*, 114 S.Ct. at 1996 ("appealability under § 1291 is to be determined for the entire category to which a claim belongs"); *Johnson v. Jones*, 115 S.Ct. at 2157 ("We of course decide appealability for categories of

orders rather than individual orders"). However, the Ninth Circuit's application of the principle is erroneous, and its result is wrong.

The touchstone the Court used in *Digital Equipment* to distinguish an appealable from a nonappealable class of orders is whether the *right* involved "rise[s] to the level of importance needed for recognition under § 1291": that is, whether the right "qualifies as 'important' in *Cohen*'s sense, as being weightier than the societal interests advanced by the ordinary operation of the final judgment principles." *Digital Equipment*, 114 S.Ct. at 2001, 2002; *see also United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("substance of the rights entailed . . . is dispositive"). The determination that qualified immunity rights outweigh ordinary final judgment considerations was made in *Mitchell v. Forsyth*, which unequivocally placed qualified immunity in the small class of claims " 'too important to be denied review'." *Mitchell*, 472 U.S. at 524, *quoting Cohen*, 337 U.S. at 546. *Mitchell* also identified the orders that constitute the appealable category as those "den[ying] a defendant's motion for dismissal or summary judgment" on a legal immunity issue. *Mitchell*, 472 U.S. at 527. The Court underscored the functional unity of that category later, when it literally defined qualified immunity in its modern form as "the objectively-determined, immediately-appealable immunity from suit accorded certain government officials under *Harlow*." *Wyatt v. Cole*, 504 U.S. at 166 n.2.

B. No Collateral Order Principle Supports A Rigid Distinction Between First And Second Qualified Immunity Appeals

In its most recent collateral order decision, *Johnson v. Jones*, the Court declined to expand *Mitchell* appealability beyond orders of the type involved in the earlier case: adverse substantive determinations on the objective reasonableness of the defendant's conduct in light of settled law. *Johnson* held unappealable an order which, "though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson*, 115 S.Ct. at 2156. Acknowledging that either type of order may force a trial which should have been precluded, the Court found that close ties between pure evidence sufficiency issues and the merits of the case, coupled with the inherent inefficiency of reviewing wholly factual matters at the appellate level, counseled against expanding the *Mitchell* category to orders dealing only with sufficiency of the evidence. *Id.* at 2156-58.

This Court's reluctance to enlarge *Mitchell* does not imply that the court of appeals is free to abridge the appealable-claims class established in *Mitchell*. The one-appeal rule, however, has that effect. It reshuffles appeals that do raise substantive qualified immunity issues, and that fall squarely within the category delineated in *Mitchell*, into "previous appeal" and "no previous appeal" subgroups, barring the latter from the court of appeals. The inappropriateness of the Ninth Circuit's procedure is apparent from the collateral order analysis used in *Johnson*.

The Court's first step in *Johnson* was to "consider *Mitchell* itself, purely as precedent." *Johnson*, 115 S.Ct. at 2156. From that perspective, there is no argument that *Mitchell* is precedent for sorting second appeals out of the appealable-claims category. The case itself dealt with a second interlocutory immunity appeal.

Next, the Court considered whether the *Johnson* petitioners' claims qualified as "conceptually distinct from the merits," and concluded that they did not. *Johnson*, 115 S.Ct. at 2156-57. It is clear simply from comparing *Johnson* (a first appeal which involved no separable issue) and *Mitchell* (a second appeal raising a conceptually distinct immunity issue) that separability is a matter of the question presented, not a function of first-round or second-round status. That is borne out by petitioner Behrens' situation. Unlike the police officers in *Johnson*, Behrens does not ask the court of appeals to determine that the plaintiff's evidence is too sparse to warrant a trial on liability; nor does he admit, as the *Johnson* petitioners did, that if the plaintiff proves his allegations immunity is foreclosed.[9] Behrens' second appeal, like Mitchell's, raises a true immunity issue: accepting as historical fact that Behrens wrote the May 8, 1986 letter to Pioneer's board of directors, that the board used the letter to fire Pelletier, and that other prospective employers declined to hire Pelletier when they learned the reason for his departure from Pioneer, were Behrens' actions an unreasonable violation of clearly established law? The character of that

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[9] The *Johnson* petitioners "do not deny that *if* they beat the plaintiff, as he believes they did, then they lack immunity." *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994).

question as a pure immunity issue conceptually separate from the merits of the underlying case is unaffected by its second-appeal posture.

Thus, two of the appealability tests the Court applied in *Johnson* offer no basis for treating immunity orders challenged on a second appeal as a nonfinal subclass for purposes of the collateral order doctrine. The third factor the Court discussed – judicial economy – cannot alone bear the weight of the essentially arbitrary distinction reflected in the one-appeal rule.

The Ninth Circuit's single-appeal decisions, like those of the concurring circuits, cite docket control and conservation of judicial resources as adequate justification for a one-appeal restriction.[10] The court stated in

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[10] The only single-appeal decision to cite *Cohen* considerations other than pure economy is *Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988). There, the First Circuit suggested that an order denying dismissal on immunity grounds is inherently nonfinal so long as there remains a possibility of a later summary judgment decision that would stave off a trial: it is "not conclusive . . . because trial is not inevitable." *Id.* at 708. The court reasoned that there can therefore be only one interlocutory immunity appeal, to be taken at the summary judgment stage as a matter of right or at the motion to dismiss stage by waiving any later summary judgment appeal. *Id.* The difficulty with the *Kaiter* analysis is its assumption that there is no irreparable deprivation of any significant immunity right, and therefore no collateral order finality, until the defendant has lost his ability at the district court level to avoid a trial. That is untenable in view of the emphasis in *Harlow*, *Anderson* and *Mitchell* on immunity's function as a shield against disruptive *pretrial* litigation entanglement as well as – and as much as – against trial and liability. *Anderson*, 483 U.S. at 640 n.2, 646 n.6; *Harlow*, 457 U.S. at 816-18; *Mitchell*, 472 U.S. at 526; *see Leatherman v. Tarrant*

Nelson and *Pelletier* that multiple appeals compound the "additional expense and delay" inherent in all interlocutory appeals; and it concluded that the single legal issue which determines qualified immunity – whether settled law clearly prohibited the defendant's actions – is "worth" only a single appeal. *Nelson v. Silverman*, 999 F.2d at 418; Pet. App. 19a.

As a practical matter, one economy concern given great weight in the Ninth Circuit's appraisal process, the sheer volume of pretrial appeals in immunity cases, has been significantly reduced by this Court's recent ruling in *Johnson v. Jones*. And nearly absent from the court of appeals' equation are the "countervailing benefits" *Johnson* examined: the importance of the qualified immunity right (*Mitchell*, 472 U.S. at 526; *Digital Equipment*, 114 S.Ct. at 2000) and "the danger of denying justice by delay." *Johnson*, 115 S.Ct. at 2157. Professor Solimine's reversal-rate data suggests that the risk of justice denied is a much weightier concern than the Ninth Circuit recognized, the number of frivolous appeals substantially smaller, and

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Narcotics Unit, 113 S.Ct. 1160, 1162 (1993) (right to avoid discovery is one of the distinctions between *Harlow* immunity from suit and mere defense to liability). Further, the potential for revisiting the immunity issue does not preclude finality when "the claim to *immediate* relief . . . is categorically and irretrievably denied. The court's decision *is* 'the final word on the subject' insofar as the time period between the court's initial denial and its subsequent reconsideration of the renewed motion is concerned." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 291 (1988) (Scalia, J., concurring) (italics in original). Thus, the point of both *Cohen* and *Mitchell* is that when a right of sufficient stature is in immediate jeopardy under an existing order, the deprivation effected by the order is "final."

the abuse of judicial resources by immunity claimants largely a misperception.

Moreover, the Ninth Circuit is incorrect in its assumption that a second appeal is inherently wasteful because it can be nothing more than a revisitation of the first. The Court has articulated, and Ninth Circuit qualified immunity cases recite, an immunity test that may involve not one legal immunity issue but two: whether the law is clearly established, and whether notwithstanding settled law the defendant's conduct is objectively reasonable under the circumstances of the case. *Anderson*, 483 U.S. at 641; *Mitchell*, 472 U.S. at 528; *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Though closely related, the two questions are not identical. The first is often less fact-specific than the latter, more readily resolved on an early motion to dismiss, and more likely to dispose of the case at the prediscovery stage favored in the *Harlow/Mitchell* line of decisions. *See also Johnson v. Jones*, 115 S.Ct. at 2157-58 (noting that interlocutory appellate review is most efficient with sparser facts and "more abstract issues of law"). In those relatively few cases where second appeals prove necessary, they will most often involve a determination of objective reasonableness on a developed post-discovery factual record. Even from the court of appeals' economy-conscious perspective, deciding those occasional second appeals may well be more conservative of judicial resources, in view of the district courts' error rate, than

the alternative: lengthy, expensive litigation followed by post-trial appeal and reversal.[11]

Petitioner Behrens' case is an apt illustration of an entirely proper and nonrepetitive use of a second appeal. In its decision on Behrens' first appeal the Ninth Circuit both revived a set of *Bivens* claims that had previously been dismissed, and simultaneously declined to decide any immunity issues related to those claims because they were not part of the appeal. Pet. App. 12a n.2, 21a. The reinstated *Bivens* claims, now the heart of the lawsuit, are based on the May 1986 letter that resulted in termination of Pelletier's employment. The district court denied Behrens' later summary judgment motion on the revived job-termination claims as well as the previously appealed claims alleging interference with Pelletier's search for

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[11] *See, e.g., Hemphill v. Kincheloe*, 987 F.2d 589 (9th Cir. 1993). Plaintiff Wetmore was one of 100 Washington State Penitentiary inmates who filed civil rights actions against the officials responsible for WSP's body-cavity search policy. The defendants moved in one of the WSP cases for summary judgment on qualified immunity, which was denied on the ground that settled law required a legitimate penological purpose for such searches. The Ninth Circuit affirmed the clearly established law ruling, but "left open the question of the defendants' reasonable belief." *Id.* at 593. Later, the defendants sought, and the district court refused, a pretrial reasonableness ruling in the Wetmore case. The matter went to trial. When the Wetmore jury found no legitimate penological purpose, the district court treated the finding as collateral estoppel in the subsequent trials of seven more WSP cases. Having consolidated the post-trial appeals, the Ninth Circuit was compelled to reverse all eight judgments on the ground that the second immunity question, defendants' reasonable belief, was a legal question which could and should have been decided in their favor before trial.

substitute employment. Although the order consists merely of a bare denial, the court must have found that settled Ninth Circuit law afforded clear constitutional protection in 1986 to individuals whose employment in the regulated savings and loan industry was expressly contingent on approval of the regulatory authorities. That conclusion conflicts with the Ninth Circuit's observation that the question remained undecided even in 1992. Pet. App. 21a. The erroneous ruling has never been reviewed. Nor has there been review of the district court's finding, also implicit in the order, that no Bank Board supervisory agent could reasonably have believed it was legal to defer approving, as managing officer of a federally insured thrift, a person who was under regulatory investigation for breach of duty at another thrift.

Moreover, the issue the appellate court did decide on Behrens' prior appeal was simply whether the "vague assumptions" that constituted Pelletier's second set of *Bivens* claims, predicated on his inability to find other employment in the industry, pleaded a violation of clearly established law. Pet. App. 21a-23a & n.12. The post-discovery record now supports a determination that Behrens' conduct was not an objectively unreasonable violation of settled law even if Pelletier became unemployable as a result. *See Anderson v. Creighton*, 483 U.S. at 639, 646 n.6.

Behrens' second qualified immunity appeal can be resolved on the record without weighing the sufficiency of respondent Pelletier's evidence or choosing between disputed versions of the historical facts. *See Johnson v. Jones*, 115 S.Ct. at 2156, 2159. The appeal presents precisely the issues of law considered in *Mitchell v. Forsyth*

and included by the Court in the category of appealable orders described there. The Ninth Circuit purports to narrow the *Mitchell* category not on the basis of any diminution in the dignity of the immunity right inherent in second appeals, nor on any unsuitability of second-appeal issues for appellate resolution, but solely and simply for convenience. Behrens respectfully submits that the court of appeals may not so truncate immunity protection.

IV. CONGRESS HAS COMMITTED EXCLUSIVELY TO THIS COURT THE POWER TO MAKE JUDICIAL RULES WHICH "DEFINE OR REFINE" INTERLOCUTORY APPEALABILITY

In March 1995, the Court held in *Swint v. Chambers County*, 115 S.Ct. 1203, that the courts of appeals may not bend and shape their interlocutory-appeal jurisdiction merely to achieve maximum efficiency. The Eleventh Circuit in *Swint* had cited efficiency and economy considerations as grounds for hearing an appeal from an admittedly nonfinal order which the court of appeals chose to treat as pendent to a properly appealable qualified immunity order. The Court disapproved the exercise in part because it undermined both the collateral order doctrine and the statutory certification procedure provided in § 1292(b). In addition, the court of appeals' economy-based approach to interlocutory appeal jurisdiction trespassed upon the recent statutory grant of authority to the Supreme Court to "prescribe rules 'defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291.' " *Swint*, 115 S.Ct. at 1210, citing 28 U.S.C. § 2072(c). The Court stated:

> Congress has thus empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, *is not expansion by court decision, but by rulemaking* under [28 U.S.C.] § 2072. . . . Congress' designation of *the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable* warrants the Judiciary's full respect.

115 S.Ct. at 1211 (emphasis added).

As *Swint* stressed, the power to create and adjust interlocutory appeal categories lies with this Court, not the courts of appeals, and is circumscribed by the notice and comment procedures provided for in § 2072. The Ninth Circuit has no more power to "refine" immunity orders described in *Mitchell* out of the appealable-order category on judicial economy principles than the Eleventh Circuit had to "define" pendent-party claims into that category on the same rationale.

Even apart from Congress's commitment of finality rules to this Court, the courts of appeals lack authority to impose any procedural rule which, like the Ninth Circuit's one-appeal limitation, is explicitly jurisdictional in purpose or effect. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 146 (1985) (rule permitting dismissal of appeal for failure to object to magistrate's recommendations is properly nonjurisdictional as articulated and applied); *cf. Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (federal courts' rules may not extend or restrict statutory jurisdiction); *see*

also Siegert v. Gilley, 500 U.S. at 236 (Kennedy, J., concurring) (the "substantive defense of qualified immunity controls" in a conflict with procedural rules).

As a solution to a perceived problem, the Ninth Circuit's one-appeal rule is a shotgun fired in the dark. The reversal data discussed here, if it is generally descriptive, indicates that the federal appellate courts are not being inundated with frivolous qualified immunity appeals. On the contrary, most pretrial immunity appeals are meritorious. For genuine instances of abuse, the courts of appeals have at least two readily available deterrents: use of the sanctions authorized by Rule 38 of the Federal Rules of Appellate Procedure; and the summary affirmance procedure adopted by circuit rule in most courts of appeals.[12]

To the extent that refinement of the pretrial immunity appeals process would benefit both the parties and the courts, the rulemaking procedure described in *Swint v. Chambers County Commission* is the appropriate route. In that vein, a legal treatise which generally endorses a single-appeal concept also cautions that any such limitation would have to "entail some complications" to be just and workable. 15A C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1992) § 3914.10.

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[12] *E.g.*, Circuit Rule 34-4, United States Court of Appeals for the Ninth Circuit; *see also* 15 C.Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977) § 3993, p. 487. As the Court observed in *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199, 1207 (1993), the "blunderbuss of dismissal" is at best an awkward and imprecise method of controlling abuse of the appellate system.

pp. 676-77. The commentators propose, for instance, that if the court of appeals concludes the record is not sufficiently developed for a decision on the immunity defense at the pleading stage, it should remand for limited factual augmentation rather than issuing a ruling that exhausts the appeal right without resolving the immunity issue. *Id.* A similar procedure would have been appropriate on Behrens' first appeal, where the Ninth Circuit unexpectedly revived dismissed *Bivens* claims with an aside indicating their vulnerability to summary judgment, but left Behrens no recourse if the district court chose, as it did, to ignore that guidance.

A rules committee with the advantages of bench-bar consultations and access to empirical data can identify recurring problems in the immunity appeal process, and can develop uniform, workable procedural solutions, much more effectively than a dozen appellate panels devising ad hoc approaches. Moreover, rules can provide the combination of specificity and flexibility that is difficult to achieve through decisional law, but essential to effect the best practicable accommodation between final judgment principles and qualified immunity policy.

As in *Swint*, the Court need not decide now the precise parameters of the *Mitchell* pretrial appeal right. It need only decide that the Ninth Circuit's inflexible jurisdictional bar against second qualified immunity appeals is inconsistent with existing collateral order decisions of this Court, and impermissibly abridges the qualified immunity defense in the circumstances of this case.

CONCLUSION

The order of the Court of Appeals for the Ninth Circuit dismissing petitioner Behrens' second pretrial qualified immunity appeal for lack of jurisdiction should be vacated and the case remanded to the court of appeals for a hearing on the merits of the appeal.

Respectfully submitted,

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STEEFEL, LEVITT & WEISS,
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Counsel for Petitioner

July, 1995

APPENDIX

Judicial Business of the United States Courts, Report of the Director (1994)

Table B-5
U.S. Courts of Appeals Cases Terminated On The Merits, by Circuit During the Twelve Month Period Ended September 30, 1994*

		TERMINATIONS ON THE MERITS							
Circuit & Nature of Proceedings	Total[1] Appeals Terminated	Percent of Total Terminations	Total	Affirmed/ Enforced	Dismissed	Reversed	Remanded	Other	[2] Percent Reversed
ALL CIRCUITS	49,184	55.3	27,219	21,896	1,588	2,790	551	394	10.4
CRIMINAL	11,708	67.7	7,932	6,761	286	620	146	119	7.8
U.S. PRISONER PETITIONS	2,882	63.4	1,826	1,541	177	71	24	13	3.9
OTHER U.S. CIVIL	4,817	56.5	2,724	2,107	112	384	75	46	14.1
PRIV. PRISONER PETITIONS	10,086	47.7	4,808	3,812	483	393	49	71	8.2
OTHER PRIVATE CIVIL	14,287	49.6	7,088	5,521	311	1,046	117	93	14.8
BANKRUPTCY	1,337	48.4	647	509	32	95	6	5	14.7
ADMINISTRATIVE APPEALS	3,469	48.0	1,666	1,171	158	156	134	47	9.4
ORIGINAL PROCEEDINGS	598	88.3	528	474	29	25	-	-	-

* Circuit by circuit tables omitted.

[1] Totals include reopened, remanded, and reinstated appeals as well as original appeals.

[2] Percent not shown where the total number of cases terminated on the merits is less than 10. No percentages of cases reversed or denied have been computed for original proceedings because of their difference from appeals, nor have they been included in the percentage of total appeals reversed.

[redacted]

In The

Supreme Court of the United States

October Term, 1975

JOHN W. HEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

[redacted]
General Counsel of Record
(Appointed by This Court)
[redacted]
A Professional Corporation
[redacted]
[redacted]
[redacted]
Attorneys for Respondent

[redacted]

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QUESTIONS PRESENTED

Last term, this Court held in *Johnson v. Jones*, 115 S. Ct. 2151 (1995) that on an interlocutory appeal from a denial of a claim for qualified immunity, an appellate court lacked jurisdiction to review issues of evidence sufficiency. Prior to *Johnson*, this Court had granted Petitioner's request to review whether the Court of Appeals for the Ninth Circuit erred in dismissing Petitioner's appeal for lack of jurisdiction because Petitioner had already sought and secured a prior interlocutory appeal on that issue. As a result of *Johnson* and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this case now presents the following questions:

1. Was the Court of Appeals correct in dismissing for lack of jurisdiction the appeal from the District Court's denial of Petitioner's summary judgment motion for qualified immunity when the appeal sought would raise only evidence sufficiency issues caused when Petitioner asserts as "given" hotly disputed issues of fact or facts found by the District Court to be contrary to that asserted by Petitioner?

2. Is the order of the District Court denying summary judgment "final" as required by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) if the Petitioner will be required to stand trial regardless of the outcome of any second appeal from that denial and could any second interlocutory appeal which raised purely legal issues concerning qualified indemnity possibly be "final"?

QUESTIONS PRESENTED – Continued

3. As a matter of public policy, should a governmental defendant be permitted to take two interlocutory appeals from denials of qualified immunity in light of the Circuits' experience that multiple appeals will be taken if permitted regardless of merits and in light of the substantial costs to civil rights plaintiffs and the judicial system or should such interlocutory appeals be limited to one at a time chosen by the governmental defendant?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Background of the Action 2

Procedural History 7

SUMMARY OF THE ARGUMENT 12

ARGUMENT 18

I. THERE IS NO APPELLATE JURISDICTION TO REVIEW THE DENIAL OF MR. BEHRENS' SECOND SUMMARY JUDGMENT MOTION AS IT RAISES ONLY EVIDENCE SUFFICIENCY ISSUES HELD LAST TERM IN *JOHNSON V. JONES* TO BE UNREVIEWABLE ON INTERLOCUTORY APPEAL 18

II. THE SUMMARY JUDGMENT DENIAL FROM WHICH PETITIONER SEEKS A SECOND INTERLOCUTORY APPEAL IS NOT A "FINAL" ORDER AS IT DOES NOT SATISFY TWO OF THE THREE ELEMENTS FOR FINALITY REQUIRED BY *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.* AND WILL NOT ALTER THE REQUIREMENT THAT PETITIONER STAND TRIAL 24

III. STRONG POLICY REASONS SUPPORT A SINGLE INTERLOCUTORY APPEAL RULE 32

CONCLUSION 39

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abel v. Miller, 904 F.2d 394 (7th Cir. 1990).....33, 34

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)..... 7

Bollow v. Federal Reserve Bank, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) 26

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)..... *passim*

Greene v. McElroy, 360 U.S. 474 (1959).....20, 26

Johnson v. Jones, 115 S. Ct. 2151 (1995) ..... *passim*

Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir. 1988)..... 34

Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach, 881 F.2d 816 (9th Cir. 1989)...10, 31

Mendocino Environmental Center v. Mendocino County, 14 F.3d 457 (9th Cir. 1994)..... 33

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987)...20, 26

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*

Nelson v. Silverman, 999 F.2d 417 (9th Cir. 1993)..... 33

Pelletier v. Federal Home Loan, 968 F.2d 865 (9th Cir. 1992)..... *passim*

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988).....10, 31

Truax v. Raich, 239 U.S. 33 (1915) 20

United States v. Briggs, 514 F.2d 794 (5th Cir. 1975)..... 20

Wisconsin v. Constantineau, 400 U.S. 433 (1972)..... 20

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Bautista v. Jones, 25 Cal. 2d 746 (1945) 20

Endler v. Schutzbank, 68 Cal. 2d 162 (1968) 20

KGB, Inc. v. Giannoulas, 104 Cal. App. 3d 844 (1980) 20

New Method Laundry Co. v. MacCann, 174 Cal. 26 (1916) 20

Purdy & Fitzpatrick v. State of California, 71 Cal. 2d 566 (1969) 20

Townsend v. Los Angeles County, 49 Cal. App. 3d 263 (1975) 20

FEDERAL STATUTES

5 U.S.C. § 552a 7

5 U.S.C. §§ 701-706 7

Former 12 U.S.C. § 1726 22

Former 12 U.S.C. § 1730(g),(h) and (q) 6, 22

Former 28 U.S.C. § 1291 25

28 U.S.C. § 2671, *et seq.* 7

STATE STATUTES

California Constitution, Art 1, § 1 20

STATEMENT OF THE CASE

The underlying action involves the coerced termination of a savings and loan chief executive officer, whose termination was ordered by a federal supervisory agent undeniably acting far beyond the scope of his authority. The manner in which the termination was directed, the refusal to retract this direction and the apparent close communication between prospective employers and regulators have acted to cause the executive to remain unemployable in his chosen profession notwithstanding a lengthy and distinguished employment career.

The action was commenced in February, 1989, but has yet to be tried because of Petitioner John W. Behrens' numerous unsuccessful efforts to cause the action to be dismissed on the basis of qualified immunity which have merely delayed the trial and exacerbated the proceedings.

The denial of Mr. Behrens' claim to qualified immunity has already been affirmed by the Ninth Circuit in *Pelletier v. Federal Home Loan*, 968 F.2d 865 (9th Cir. 1992) (hereafter "*Pelletier I*") reprinted at Petitioner's Appendix ("P.A.") 10a. The Circuit Court found a clearly established right to future employment in a chosen profession was violated by Mr. Behrens' alleged conduct but did not reach whether Respondent Robert J. Pelletier had a clearly established right to his employment with Pioneer Savings.

After having his second summary judgment motion denied because of the existence of triable issues of fact, Mr. Behrens sought to take a second interlocutory appeal. The Ninth Circuit dismissed the appeal for lack of jurisdiction because there had already been one interlocutory

appeal. Mr. Behrens sought review by this Court asserting that he was being denied the right to appeal whether Mr. Pelletier had a clearly established right to his Pioneer Savings employment, an issue which had not been decided in *Pelletier I.* However, even if this Court permits him a second interlocutory appeal, Mr. Behrens will still be required to stand trial on the issue of his violation of Mr. Pelletier's clearly established right to future employment in his chosen profession which issue was decided in *Pelletier I.* Thus, the basis for any interlocutory appeal (trial avoidance) is simply not applicable in this case regardless of the outcome.

After certiorari was granted, this Court decided *Johnson v. Jones,* 115 S. Ct. 2151 (1995). To avoid the application of *Johnson,* Mr. Behrens and the two Amicus briefs assert as "given", facts which, to the contrary, have been hotly contested and either have not been decided in the District Court or have been decided against Mr. Behrens in a manner contrary to his assertions to this Court. As a result, this Court must first decide whether any appellate jurisdiction exists as to the appeal sought in this case after *Johnson* is applied. Only if such an issue is raised need this Court address the "One Interlocutory Appeal" rule adopted by three circuits.

Background of the Action

In May, 1986, Respondent Robert J. Pelletier was employed, pursuant to a written employment agreement, as the President and Chief Executive Officer of Pioneer Savings and Loan Association, a California chartered institution whose accounts were insured by the Federal

Savings and Loan Insurance Corporation ("FSLIC").[1] Mr. Pelletier had been so employed for approximately fourteen months; and his employment had been approved by the California Savings and Loan Commissioner. Contrary to the factual assertions contained in Petitioner John W. Behrens' opening brief, Mr. Pelletier's employment with Pioneer Savings was not "conditional" on Mr. Behrens' approval or any other regulatory approval.[2]

Prior to joining Pioneer Savings, Mr. Pelletier had a long and distinguished career in the financial institution industry spanning over 25 years. One of his former positions was as a Senior Vice-President of Beverly Hills Savings and Loan Association, voluntarily resigning in 1984 rather than relocating his residence as requested by his employer. At the time of his departure, Beverly Hills Savings was solvent and undergoing a hostile takeover effort by a shareholder.

Upon leaving Beverly Hills Savings, Mr. Pelletier was asked to become President of Equitable Savings and Loan

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[1] Mr. Pelletier's Statement of the Case is drawn primarily from his declaration filed in the District Court on August 1, 1991 and Samuel T. Rees' declaration filed August 5, 1991, both of which were attached to Mr. Pelletier's Statement Of Genuine Issues Of Material Fact In Opposition To Motions For Summary Judgment, filed on March 14, 1994.

[2] As discussed more fully *infra* in Section I., the "purely legal issue" which Mr. Behrens seeks to have reviewed during his second interlocutory appeal is whether Mr. Pelletier had a "clearly established right" to his employment at Pioneer Savings when that employment was conditioned upon Mr. Behrens' approval. But this "condition" is a hotly disputed factual question which the District Court has not decided in Mr. Behrens' favor.

Association, a troubled financial institution. Pursuant to a regulatory agreement, Equitable Savings was required to secure federal regulatory approval of any new president before such employment was to occur. Equitable requested and promptly received such regulatory approval of Mr. Pelletier's employment. Over the next few months, Mr. Pelletier was successful in causing Equitable to be recapitalized and sold, receiving praise for his efforts. Again, rather than relocate his home to the new headquarters of Equitable in Northern California, Mr. Pelletier voluntarily resigned.

Mr. Pelletier was recruited to join Pioneer Savings as its President after leaving Equitable Savings. In March, 1985, Mr. Pelletier became Pioneer Savings' President and Chief Executive Officer and a member of its Board of Directors. Mr. Pelletier's employment was the subject of a written agreement. Regulatory approval of Mr. Pelletier's employment was promptly sought and secured from the California Savings and Loan Commissioner, Pioneer Savings' primary regulator. However, no federal regulatory approval was sought or even considered until several months after his employment began.

Without any enforceable requirement that it do so, Pioneer Savings applied for the approval of Mr. Pelletier's employment to James Cirona, the Principal Supervisory Agent for the Federal Home Loan Bank Board ("FHLBB") Eleventh District. The application sat for approximately 11 months on the desk of Scott Schultz, Pioneer Savings' initial subordinate supervisory agent, and was never presented to the Principal Supervisory Agent for review. During that time, the FHLBB/FSLIC dealt with Mr. Pelletier as Pioneer Savings' President.

Mr. Behrens was appointed by the FHLBB/FSLIC as a subordinate supervisory agent in 1984. After about a year with this designation, Mr. Behrens replaced Mr. Schultz as Pioneer Savings' subordinate supervisory agent.

Mr. Behrens on May 8, 1986, authored and signed a letter on FHLBB letterhead directing Pioneer Savings Board of Directors to terminate Mr. Pelletier.

Mr. Behrens' May 8 letter was inaccurate in several respects. The letter purported to be a "response" to Pioneer's application to the Principal Supervisory Agent, but Mr. Cirona had never been provided with the application nor had he authorized any such response. The letter also implied that Mr. Pelletier was being investigated by the FSLIC as part of its Beverly Hills Savings failure investigation although no such investigation of Mr. Pelletier was apparently ongoing and Mr. Behrens had *no* evidence of any improper action by Mr. Pelletier.

The Behrens letter was given wide distribution including the entire Eleventh District supervisory staff and the California Savings and Loan Commissioner. It is undisputed that immediately upon receipt of this letter, Pioneer Savings' Directors fired Mr. Pelletier and he has been unable to secure any financial institution position after that regulator-demanded termination.

Intent and purpose were established when shortly after the letter was written, Mr. Behrens bragged to Mr. Schultz that he was finally able to "get rid of Pelletier".

Mr. Behrens' directive commanded such obedience from Pioneer Savings because it was written under color of federal law on federal regulatory letterhead. As a

subordinate "supervisory agent", Mr. Behrens was the line agent responsible for federal oversight of Pioneer Savings and for recommendations on all regulatory applications concerning that institution.

Mr. Behrens, however, was not granted authority to approve Mr. Pelletier's employment nor had Mr. Behrens been granted the authority to remove Mr. Pelletier from his position as a financial institution officer, such authority having been granted by Congress only to the FHLBB/FSLIC under appropriate circumstances and subject to administrative due process rights.[3]

In seeking subsequent employment, Mr. Pelletier naturally has been required to disclose the reason for his termination from Pioneer Savings. Upon learning that this termination was based upon regulatory direction, prospective employers have all declined to employ him. In addition, it is customary in the industry to orally "clear" a senior officer candidate with the "regulators". Mr. Behrens transmission of his May 8 directive to all supervisory staff and the California Savings and Loan Commissioner effectively insured that any such inquiry by a prospective employer would be to a "regulator" who knew of the termination instruction.

Mr. Pelletier also has been utterly unsuccessful in causing Mr. Behrens' termination letter to be either withdrawn or retracted by either Mr. Behrens or the appropriate federal agencies.

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[3] See former 12 *U.S.C.* § 1730 (g),(h) and (q) then applicable and Respondent's Appendix ("R.A.") 2a.

As a result, Mr. Pelletier became essentially unemployable during the time in his life when his income should have been at its highest and provided him and his wife with retirement funds. After nine years, Mr. Pelletier has become technically obsolete in his field. Mr. Pelletier and his wife lost their savings, their vacation property, their credit rating and ultimately their home. They now reside in a trailer and subsist on Social Security retirement benefits.[4]

Procedural History

Mr. Pelletier commenced this action in February, 1989 and for the last nearly seven years, has been attempting to cause this action to be tried. The action now consists of two claims: A claim for money damages for violation of Constitutional rights as against Mr. Behrens under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and a separate claim for negligence against the United States under the Federal Tort Claims Act (28 *U.S.C.* § 2671, *et seq.*).[5]

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[4] This Court has granted Mr. Pelletier *in forma pauperis* status.

[5] Mr. Pelletier's claims for violation of the Privacy Act (5 *U.S.C.* § 552a) and the Administrative Procedure Act (5 *U.S.C.* § 701-706) as well as his claims asserted against the Federal Home Loan Bank of San Francisco and the statutory successor to the FHLBB/FSLIC were dismissed by the District Court. Since the dismissal orders are not yet final, Mr. Pelletier has not been accorded any appellate review of these dismissals.

A chronological listing of relevant stages of the litigation are set forth at Joint Appendix ("J.A.") 1-6. As noted, Mr. Behrens has already received numerous reviews of his claim to qualified immunity at both the district and circuit court levels.

Briefly, Mr. Behrens moved to dismiss the complaint once service was effected.[6] One of the grounds asserted for dismissal was qualified immunity. While the motion was partially granted on the basis of an erroneous application of the statute of limitations, it was denied on the basis of qualified immunity.[7] J.A. 26. This motion turned out to be the second District Court review of Mr. Behrens' claim of qualified immunity as the issue was also reviewed in connection with Mr. Behrens' request for a discovery stay. J.A. 25.

Mr. Behrens appealed the denial of the motion to dismiss relying on *Mitchell v. Forsyth*, 472 U.S. 511 (1985) to provide appellate jurisdiction. J.A. 42. Included in his issues briefed during this first appeal are the issues

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[6] Mr. Behrens also moved for summary judgment but refused to submit to discovery. The District Court denied this motion without prejudice as premature.

[7] The District Court limited Mr. Pelletier's *Bivens* claims to conduct occurring within one year of suit. Mr. Behrens essentially conceded that the District Court's statute of limitations ruling was contrary to Ninth Circuit authority. J.A. 125. The Ninth Circuit in affirming the denial of qualified immunity also suggested that this statute of limitation ruling was in error. See *Pelletier I*, at P.A. 15a. Upon remand, Mr. Behrens stipulated to modifying the Court's order of October, 1989, on the statute of limitations issue. See P.A. 5a and Mr. Behrens' stipulation.

which Mr. Behrens seeks now to raise in a second appeal. J.A. 120-121.

Mr. Behrens' first circuit court review of his claim to qualified immunity was by a motion panel in connection with his request for a discovery stay. J.A. 51. The stay request was denied.[8] J.A. 127. While his first appeal was being briefed and argued, Mr. Behrens strategically undertook no effort to renew his motion for summary judgment previously denied as premature.

On June 29, 1992, the Ninth Circuit issued its opinion in *Pelletier I*, P.A. 10a, affirming the denial of qualified immunity. The Circuit Court held that Mr. Pelletier had asserted a violation of a clearly established right to pursue a chosen profession free of governmental interference, even though the Court did not reach the issue of whether Mr. Pelletier's specific employment with Pioneer Savings was similarly protected. Contrary to the assertion that the Circuit Court relied on "nebulous theories of conspiracy", the opinion pointed to specific allegations which taken as true and if proven at trial would constitute a claim that Mr. Behrens violated Mr. Pelletier's clearly established rights to pursue his chosen profession. P.A. 23a-24a.

The Ninth Circuit also resolved Mr. Pelletier's assertion that multiple interlocutory appeals of qualified immunity were not required under *Mitchell, supra* and

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[8] As trial approached and no decision had been rendered on the first appeal, Mr. Behrens sought and secured a stay of proceedings in the District Court. J.A. 189 and 227. The Ninth Circuit's stay order remained in force until September, 1993, when the action was finally remanded to the District Court.

that such appeals were abusive and should be restricted to denials of motions for summary judgment.[9]

The Ninth Circuit noted that as a result of the grant of appellate jurisdiction in *Mitchell*, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decisions." *Pelletier I.* P.A. at 18a, citing and quoting *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988) and also citing *Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach*, 881 F.2d 816, 817 (9th Cir. 1989). The Court then held that only one interlocutory appeal would be permitted as a matter of right at a time to be chosen by the governmental defendant.

Mr. Behrens' third appellate review of his qualified immunity claim occurred in August, 1992, when he filed his Petition for Panel Rehearing. J.A. 269. By that Petition, Mr. Behrens sought to have the Ninth Circuit reconsider its ruling on qualified immunity and also delete from its opinion that portion which limited him to one interlocutory appeal. By Order, filed September 24, 1993, Mr. Behrens' petition was unanimously denied. J.A. 282. Nevertheless, this opportunity to argue the merits of the qualified immunity claim became Mr. Behrens' third bite at the interlocutory appellate apple.[10]

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[9] Mr. Behrens asserts that *Mitchell* was a two appeal case. However, only one of those appeals was from a denial of qualified immunity. The first appeal concerned absolute immunity.

[10] Mr. Pelletier contends that if Mr. Behrens' motive was something other than delay, he should have filed his Petition for Certiorari immediately following this denial of his Petition for

When the action returned to the District Court nearly four years after the notice of appeal, Mr. Behrens filed a new motion for summary judgment on the basis of qualified immunity. J.A. 283. There were no new legal theories advanced by Mr. Behrens in the summary judgment motion which were not made during the earlier motion to dismiss. This second motion for summary judgment was denied by the District Court nearly a year ago on September 7, 1994. P.A. 2a. The District Court specifically found that material issues of fact remain. See P.A. 5a which is amply supported by Mr. Pelletier's Statement of Genuine Issues etc., filed March 14, 1994.[11]

Mr. Behrens filed a new notice of appeal from this second summary judgment denial. J.A. 5. Mr. Pelletier responded by immediately filing a motion in the Ninth Circuit to dismiss the appeal for lack of jurisdiction and an application in the District Court to have the appeal certified as frivolous. J.A. 373 and 359. On November 7, 1994, the District Court, in fact, found the appeal to be frivolous and thereby put the action back on track for trial. P.A. 8a. Mr. Behrens then applied to the Ninth

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Panel Rehearing as he clearly intended to move again for summary judgment. Indeed, Mr. Behrens also could have moved for summary judgment after his deposition was taken and while the first appeal was being briefed, which would have expedited the process.

[11] Notwithstanding the absence of factual determinations by the District Court, Mr. Behrens asserts in his Opening Brief as "uncontested" his version of the disputed facts. A similar erroneous recitation of the facts is included in the two Amicus briefs.

Circuit for a stay of proceedings in the District Court. J.A. 6.

On November 17, 1994, the Ninth Circuit ruled on the motion to dismiss and the stay application. The Court dismissed the appeal for lack of jurisdiction and denied the stay application. P.A. 1a. By his writ petition, Mr. Behrens has asked this Court to review the dismissal for lack of jurisdiction. Once again, the trial of the underlying action has been stayed.

SUMMARY OF THE ARGUMENT

This Court in *Mitchell, supra,* permitted interlocutory appeals from denials of claims for qualified immunity provided that the appeal sought to determine the "purely legal issue" of whether the right allegedly violated was clearly established. Last term in *Johnson, supra,* this Court determined that an appeal from a denial of qualified immunity which raised only evidence sufficiency issues did not satisfy the finality requirements of *Mitchell* and was not immediately appealable.

Mr. Behrens has asked this Court to review and reverse the determination of the Ninth Circuit dismissing his qualified immunity appeal for lack of jurisdiction because of his prior appeal on the same issue. Certiorari was granted by this Court before *Johnson* was decided.

1. The first issue to be decided is whether certiorari was improvidently granted and whether this case is resolved by applying *Johnson* to the issues sought to be raised by Mr. Behrens.

In order to create a colorable purely legal issue on appeal, Mr. Behrens has asserted as "given", facts which are either hotly disputed or have been decided against Mr. Behrens. For example, Mr. Behrens asserts as "given" that Mr. Pelletier's employment with Pioneer Savings was conditioned upon Mr. Behrens' approval, that Mr. Pelletier was under investigation at the time and that in any event Mr. Behrens never directed termination of employment.

In appealing the denial of a motion for summary judgment after *Johnson*, Mr. Behrens is required to assume as true the factual contentions of the plaintiff on all unresolved triable issues of fact and otherwise use the facts established or decided by the District Court. Mr. Behrens is not free to color the facts on appeal to merely include his contentions, some of which have been rejected.

In this case, Mr. Behrens has not avoided evidence issues on appeal because, had he done so, the purely legal issue he would be required to address is whether he violated Mr. Pelletier's clearly established right to his vested employment as Pioneer Savings' President when without authority and without basis Mr. Behrens directed Pioneer Savings to terminate Mr. Pelletier's employment in order to "get rid of" him. Framed in this light, it is clear that any appeal of this issue by Mr. Behrens would be frivolous and is being avoided for that purpose.

Because Mr. Behrens does not seek to raise the only non-evidentiary purely legal issue resulting from the District Court's denial of summary judgment but instead seeks to have an appellate court judicially resolve

disputed factual issues or overturn contrary factual findings both of which violate *Johnson*'s holding, this case does not raise the "multiple interlocutory appeal" issue for which certiorari was granted.

2. This Court in *Mitchell, supra,* and applying the three-prong test from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) determined that an interlocutory appeal should be permitted from a denial of qualified immunity primarily because such a claim was an immunity from suit which would be lost if review were delayed until final judgment after trial. In *Johnson,* this Court again used the *Mitchell/Cohen* analysis to determine appellate jurisdiction. Applying the same analysis to this case establishes that the required elements of finality are lacking in this and in any other second interlocutory appeal.

To be appealable after *Johnson,* a purely legal issue must be raised. A second appeal requires an unsuccessful first appeal where such a purely legal issue has been decided adversely to the governmental defendant. The only method by which a governmental defendant may escape trial on the previously decided issue is for that defendant to secure summary judgment for lack of evidence. The denial of such a motion is not appealable after *Johnson.*

If a governmental defendant will be required to stand trial regardless of the outcome of the second appeal he seeks, two of the three-prongs of the *Cohen* test have not been met and the order is not final.

In this case, Mr. Behrens is required to stand trial on the claim that his conduct has precluded Mr. Pelletier

from securing employment in his chosen profession, which right to be free from governmental interference was found to be clearly established in *Pelletier I*. This trial will be required regardless of the outcome of the second appeal he now seeks. The trial became mandated when the District Court denied Mr. Behrens motion for summary judgment finding triable issues of fact. Since the trial will occur, the denial of summary judgment order is not "final" and there is no appellate jurisdiction.

3. The Ninth Circuit, following the lead of the First and Seventh Circuits, has limited a governmental defendant to one interlocutory appeal on the grounds of qualified immunity. This is, of course, one more appeal that the plaintiff receives but was permitted to be taken at a time to be selected by the governmental defendant and presumable when he believes that he is in the best position to prevail. Mr. Behrens believes that he should have at least two and perhaps unlimited interlocutory appeals.

Interlocutory appeals are costly, time consuming and damaging to the rights of the litigants, the district courts' dockets and others seeking relief in the federal courts whose cases are disrupted in the process. The experience of the Ninth Circuit is that governmental defendants will appeal as often as permitted without regard to the merits in a "knee-jerk" fashion. Clearly, there are no economic restraints on such appeals which are financed by governmental employers using government lawyers.

Interlocutory appeals and resulting stays take an enormous toll on efforts to marshall evidence. Stays of discovery preclude a plaintiff from memorializing the facts necessary to prove his case at a time when memories

are fresh. Stays on the eve of trial have an even more damaging aspect as potential trial witnesses may be lost.

In this case, the action was commenced in February 1989 and Mr. Behrens has used his qualified immunity defense and appeal to delay the trial for nearly seven years. Merely from the point of view of delay, the stays in this action have and will delay a resolution by at least 3 years.

The interlocutory appeal process itself also is costly in that on each occasion numerous briefs and memoranda are required. This case has required briefing on seven different stay motions, three merits briefs, a rehearing brief, a certiorari brief and a merits brief in this Court and the case has not even gone through pre-trial. Clearly, another two year appeal process is expected from any jury determination in favor of Mr. Pelletier.

Other litigants also suffer as a result of permitting multiple interlocutory appeals. As Mr. Behrens notes in his brief, governmental agents will always appeal on the eve of trial if permitted to do so. Such an appeal effectively mandates that the trial be continued, thus wasting the time set aside for trial and delaying all other cases on the docket.

Thus, from a pure cost/benefit analysis, a one interlocutory appeal rule is all that should be required.

Judge shopping is another abuse resulting from multiple interlocutory appeals as the likelihood of drawing the same circuit merit panel is reduced as governmental defendants stretch the time between appeals. Providing multiple interlocutory appeals essentially demeans the

decision-making ability of the district judges whose decisions were already affirmed on the first interlocutory appeal.

The statistical argument advanced by Mr. Behrens is misleading. His statistics fail to note the majority of cases which are decided without published opinions, far more likely when the appeal is dismissed or the underlying order affirmed. Additionally, the real issue is the statistical reversal of second appeals, of which none have been found to have been reported to date.

The Ninth Circuit in *Pelletier I* gave the choice of timing of the interlocutory to the governmental defendant. Clearly, this choice will be exercised when the defendant believes that he will have the best opportunity of overturning the decision of the district court and avoiding trial. The governmental defendant knows what acts he committed even if the plaintiff requires discovery. Thus, the defendant is in the best position to know whether his best chance is at the pleading stage or after summary judgment. For policy reasons, the One Interlocutory Appeal rule should be affirmed.

Since the Court need not reach the multiple interlocutory appeal issue to decide this case, since the One Interlocutory Appeal rule is mandated by the principles of *Mitchell* and since there are strong policy reasons supporting a One Interlocutory Appeal Rule, the dismissal for lack of jurisdiction order should be affirmed.

ARGUMENT

I. THERE IS NO APPELLATE JURISDICTION TO REVIEW THE DENIAL OF MR. BEHRENS' SECOND SUMMARY JUDGMENT MOTION AS IT RAISES ONLY EVIDENCE SUFFICIENCY ISSUES HELD LAST TERM IN *JOHNSON V. JONES* TO BE UNREVIEWABLE ON INTERLOCUTORY APPEAL.

In *Mitchell v. Forsyth, supra,* this Court held that a governmental official was entitled to take an interlocutory appeal from the denial of a claim for qualified immunity in order to seek review of the purely legal issue of whether certain given facts violated "clearly established" law. *Id.* at 528.

Last term, this Court decided that an order, which only concerns the sufficiency of the evidence, is not appealable. *Johnson v. Jones,* 115 S. Ct. 2151 (1995). As a result, *Mitchell* and *Johnson* mandate that the facts be "given" to justify an interlocutory appeal. Such a result clearly occurs from a ruling on a motion to dismiss as the Court takes plaintiff's allegations as true. On a motion for summary judgment, however, the factual issues may well not be decided and be subject to conflicting evidence requiring trial. In such a circumstance, the governmental official must assume for purposes of the appeal that the facts are as contended by the plaintiff rather than himself. To do otherwise is to request an appellate determination of contested and disputed issues of fact contrary to the holding in *Johnson.*

The Seventh Circuit in *Johnson* was asked to review the denial of a motion for summary judgment on the grounds of qualified immunity. The plaintiff had alleged

that he had been beaten by the governmental defendants. Certain of the governmental defendants asserted that there was no evidence of their involvement in the beatings and the denial of their summary judgment motion was in error because plaintiff had failed to present evidence of a triable issue of fact on their involvement. The Seventh Circuit determined that it lacked jurisdiction over the appeal and this Court affirmed.

Whether sufficient evidence was presented in the trial court did not raise that neat abstract issue of law which is reviewable on interlocutory appeal. While the governmental defendants in *Johnson* could have appealed the purely legal issue of whether the beating of a plaintiff violated a clearly established right not to be beaten, the governmental defendants obviously chose not to raise that frivolous issue. As a result, appellate jurisdiction was found to be lacking.

In order to raise a colorable claim to qualified immunity on the Pioneer Savings termination issue, Mr. Behrens has asserted as "given", facts which are neither given nor even accurate. Moreover, these misstatements of fact have been repeated in the two Amicus briefs, again as if they are "given" when in fact they are disputed. Needless to say, Mr. Behrens has carefully avoided providing any reference to any order of the District Court where such facts have been determined.

These erroneously assumed facts include: (i) Mr. Pelletier's employment with Pioneer Savings was conditional and required Mr. Behrens' approval; (ii) Mr. Pelletier was under investigation for his involvement with Beverly Hills Savings which precluded his being

approved; and (iii) Mr. Behrens neither directed nor intended to direct Pioneer Savings to terminate Mr. Pelletier's employment.

If one examines the facts as contended by Mr. Pelletier and/or as found by the District Court, Mr. Behrens' appeal issue becomes whether he violated Mr. Pelletier's clearly established right to his vested employment as Pioneer Savings' President when without authority and without basis Mr. Behrens directed Pioneer Savings to terminate Mr. Pelletier's employment in order to "get rid of" him. Framed in this light, it is clear that any appeal of this issue by Mr. Behrens would be frivolous.

Mr. Pelletier clearly has a long established right to a vested employment position free of governmental interference. Such a position is well founded in both federal and California law. See *Truax v. Raich*, 239 U.S. 33 (1915); *Greene v. McElroy*, 360 U.S. 474 (1959); *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975); *Wisconsin v. Constantineau*, 400 U.S. 433 (1972); *California Constitution*, Art 1, § 1; *Endler v. Schutzbank*, 68 Cal. 2d 162 (1968); *Townsend v. Los Angeles County*, 49 Cal. App. 3d 263 (1975); *New Method Laundry Co. v. MacCann*, 174 Cal. 26 (1916); *Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566 (1969); *Bautista v. Jones*, 25 Cal. 2d 746 (1945) and *KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844 (1980). As properly framed, it is clear that a second interlocutory appeal is unnecessary.

In order to establish the "given" facts, Mr. Behrens should reference the order denying summary judgment. Yet, a review of the summary judgment denial by the

District Court demonstrates that the foregoing factual issues were not "found" by the District Court. As a result, the appellate review now sought by Mr. Behrens must resolve evidence sufficiency issues in order to reach the legal issue posed by Mr. Behrens. This being the case, this Court need not reach the issue of whether multiple interlocutory appeals should be permitted because jurisdiction for the appeal sought by Mr. Behrens is lacking in any event pursuant to the holding in *Johnson*.

For example, Mr. Behrens asserts that the District Court decided that Mr. Pelletier had a clearly established right to an employment position which was expressly subject to Mr. Behrens' approval. See Petitioner's Opening Brief at page 35. However, a review of the order denying summary judgment illustrates that no such determination has been made by the District Court. See P.A. 5a and 6a. Instead, the summary judgment denial specifically found that triable issues of fact precluded summary judgment without making the factual determinations which Mr. Behrens now asserts are "given" facts.

As was demonstrated to the contrary in the District Court, Mr. Pelletier's employment with Pioneer Savings was governed by an unconditional written contract. This contract did not require any federal regulatory approval in order to be effective and none was sought prior to employment. Moreover, Mr. Pelletier's employment was promptly approved by the California Savings and Loan Commissioner, Pioneer Savings' primary regulator, and seemed to have been accepted by the FHLBB/FSLIC.

While it is true that unbeknownst to Mr. Pelletier at the time of contracting, the FHLBB had inserted a condition subsequent into its 1984 resolution granting Pioneer Savings' federal insurance of accounts, this condition only purported to require Pioneer Savings to seek the approval of the *Principal* Supervisory Agent for the Eleventh District of the FHLBB (James Cirona) for any new president it wished to select. Mr. Pelletier has consistently asserted that no authority exists for such a condition *subsequent* to insurance of accounts and that 1984 resolution of the FHLBB purporting to create such a condition was unenforceable. See former 12 *U.S.C.* § 1726.

However, the District Court did not need to reach the issue of enforceability of the 1984 resolution because Principal Supervisory Agent Cirona was never asked by Mr. Behrens to review, approve or disapprove Mr. Pelletier's employment.[12] Moreover, it is undisputed that the FHLBB/FSLIC dealt with Mr. Pelletier as Pioneer Savings' President for the next eleven months and advised him that his employment was not in danger.

A second fact which Mr. Behrens takes as "given" but which has never been established or conceded was that Mr. Pelletier was under some investigation for his involvement with Beverly Hills Savings.

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[12] It is fair to assume that the District Court has found that Mr. Pelletier's employment was not conditional as the District Court did find that neither Mr. Behrens nor Mr. Cirona had the authority to "remove" Mr. Pelletier from his position at Pioneer Savings. The authority to remove is vested solely in the FHLBB. See R.A. 1a-2a and former 12 *U.S.C.* § 1730 (g), (h) and (q).

Beverly Hills Savings was declared insolvent and seized in April 1985 by the federal regulators. This seizure was a little over one year after Mr. Pelletier's voluntary resignation. While an investigation into the cause of the failure was apparently undertaken, there is nothing in the record to suggest that Mr. Pelletier was the focus of any such investigation particularly since he left during a time of its unquestioned solvency. Certainly, Mr. Behrens undertook no investigation of Mr. Pelletier.

Mr. Pelletier's opposition to summary judgment controverted that he personally was the subject of any investigation prior to May 8, 1986, and the defendants' positions contradicted each other and were without evidentiary support. See Mr. Pelletier's Statement Of Genuine Issues at Paragraph A.4.

Also omitted in Mr. Behrens' recitation of the facts was that Mr. Pelletier recently had been approved by Principal Supervisory Agent Cirona to serve as the President of Equitable Savings, a troubled institution. This approval post-dated Mr. Pelletier's employment with Beverly Hills Savings and contradicts any claim of an ongoing investigation.

Finally, Mr. Behrens implies as a given fact that his conduct was neither intended to nor in fact resulted in Mr. Pelletier's termination of employment. Not only is this position belied by the language of his termination directive, the District Court has already found to the contrary based upon the undisputed evidence. See R.A. 1a, Finding 2. Indeed, shortly after his directive was written, Mr. Behrens bragged to a co-worker, Mr. Schultz, that he was finally able to "get rid of Pelletier".

Following *Johnson*, it is either necessary for the District Court to identify the facts upon which it bases its qualified immunity determination or for the Circuit Court to determine which facts must have been established. When triable issues of fact exist, the "purely legal issue" which may be raised by interlocutory appeal requires that the plaintiff's factual contentions be accepted for purposes of argument rather than the governmental defendant's version of the facts. For a Circuit Court to accept the governmental defendant's version of contested facts, it must of necessity make an evidence sufficiency determination that the District Court erred in failing to accept such disputed facts as established. *Johnson* precludes such an interlocutory appellate review.

On this appeal, the District Court has not made findings that Mr. Behrens' version of the facts are established. In some instances, the District Court has made contrary findings. In other instances, the District Court has merely found triable issues of fact. The Ninth Circuit is not in a position to accept Mr. Behrens' version of the facts. Applying the holding of *Johnson* to the issues sought to be raised by Mr. Behrens, no interlocutory jurisdiction exists for the appeal as framed and the dismissal should be affirmed.

II. THE SUMMARY JUDGMENT DENIAL FROM WHICH PETITIONER SEEKS A SECOND INTERLOCUTORY APPEAL IS NOT A "FINAL" ORDER AS IT DOES NOT SATISFY TWO OF THE THREE ELEMENTS FOR FINALITY REQUIRED BY *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.* AND WILL NOT ALTER THE REQUIREMENT THAT PETITIONER STAND TRIAL.

Mr. Behrens seeks a second interlocutory appeal, this time to review the denial by the District Court of his

second summary judgment motion which he brought on the eve of trial. The Ninth Circuit dismissed this second appeal for lack of jurisdiction because there had already been one interlocutory appeal on this issue. This ruling was correct in that a second appeal will not alter the requirement that Mr. Behrens must stand trial. Thus, the order now sought to be reviewed is not "unreviewable" as required by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Mitchell, supra,* and *Johnson, supra.* Indeed, any such second appeal of a qualified immunity claim, which is not based upon evidence sufficiency, must of necessity fail the *Cohen* three-prong test for finality.

Mr. Behrens's first interlocutory appeal from the denial of his claim for qualified immunity resulted in the Ninth Circuit's published opinion in *Pelletier I,* at P.A. 10a. In his complaint, Mr. Pelletier had alleged both that Mr. Behrens had caused him to be fired in 1986 from his position as President of Pioneer Savings and thereafter had prevented him from securing any employment in the financial institution field. J.A. 12-13. Mr. Behrens had moved to dismiss the claim.

The District Court partially granted the motion on statute of limitations grounds as to the Pioneer Savings termination claim but denied the motion as to the future employment prevention claim. While the statute of limitations ruling was erroneous, Mr. Pelletier was precluded from appealing that ruling for lack of a final judgment. 28 *U.S.C.* § 1291. Nevertheless, Mr. Behrens sought an interlocutory appellate review on the termination claim and indeed seemed to concede the erroneous statute of limitation ruling.

The Ninth Circuit in *Pelletier I* noted the erroneous statute of limitations ruling on the Pioneer Savings termination claim but did not otherwise decide whether Mr. Pelletier had a clearly established right to retain his position as Pioneer's President free from Mr. Behrens' termination direction. P.A. 15a and 21a. But on the employment prevention claim, the Ninth Circuit ruled that Mr. Pelletier did allege a violation of a clearly established Constitutional liberty interest because Mr. Behrens' alleged post-termination conduct seriously damaged Mr. Pelletier's standing in the community and effectively precluded future work in his chosen profession. *Pelletier I* at P.A. 21a-22a citing *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1100 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Greene, supra,* and *Merritt, supra.*

Upon remand, the District Court corrected its erroneous statute of limitation ruling and reinstated Mr. Pelletier's Pioneer Savings termination claim. Indeed, Mr. Behrens stipulated to that modification of the prior dismissal order to reassert the termination claim. As a result, the action was scheduled to proceed to trial on both the Pioneer Savings termination claim *and* the future employment prevention claim.

On virtually the last day to file pre-trial motions, Mr. Behrens moved a second time for summary judgment. The motion delayed the trial but was ultimately denied because of the existence of triable issues of fact. P.A. 2a. As the trial approached, Mr. Behrens noticed a second interlocutory appeal which again delayed the litigation. The District Court found the appeal to be frivolous and the Ninth Circuit dismissed the appeal for lack of jurisdiction. P.A. 1a and 8a.

This Court first permitted a governmental defendant to prosecute an interlocutory appeal from a claim of qualified immunity in *Mitchell, supra.* In reaching the decision that an interlocutory appeal should be allowed, this Court in *Mitchell* analyzed *Cohen, supra,* and determined that the three-prong test required by *Cohen* to establish finality was sufficiently satisfied so as to allow an interlocutory appeal solely on the purely legal issue raised by a claim of qualified immunity.

Under *Cohen,* an interlocutory order is final and appealable if it conclusively determines the disputed questions, resolves an issue separate from the merits of the action and would be effectively unreviewable on appeal from a final judgment. Primarily, this Court in *Mitchell* reasoned that it was important to allow an interlocutory qualified immunity appeal because a governmental official would lose forever his right to avoid trial if the qualified immunity issue were only reviewed after trial.

The conduct under review in *Mitchell* was whether at the time the Attorney General had authorized a warrantless wiretap, the law precluding such taps was clearly established. No factual dispute was involved in this determination as the conduct at issue had been admitted. This Court found that the law was not clearly established at the time the taps were approved and, thus, the defense of qualified immunity was established.

Last term, this Court decided *Johnson, supra.* As discussed above, the issue in *Johnson* concerned whether an interlocutory appeal lies from a summary judgment denial involving a qualified immunity case when the

underlying facts are in dispute. The Court reexamined the reasoning of *Mitchell* and also applied the three part *Cohen* test. As a result, this Court then held that a denial of a summary judgment motion which raises an evidence sufficiency issue was not immediately appealable. The method of analysis applied in *Johnson* is equally applicable in this case.

This Court in *Johnson* determined that an evidence sufficiency issue did not raise a "purely legal" issue as required by the *Mitchell* analysis. An evidence sufficiency issue also violated the *Mitchell* admonition that the appellate court need not consider the correctness of the plaintiff's version of the facts. As a result, the reasoning of *Mitchell* did not justify an interlocutory appeal.

Using the *Cohen* analysis, this Court held that an evidence sufficiency issue was not a "separate" issue in the sense that it was not significantly different from the fact-related legal issues that underlie a plaintiff's claim. Moreover, this Court found that the competing policy considerations did not justify a relaxation of the separability requirement to permit an evidence sufficiency appeal. Accordingly, the *Cohen* three-prong test was not satisfied so as to permit an interlocutory appeal.

Applying first the reasoning of *Mitchell* to this case, it is clear that a second appeal limited to the Pioneer Savings termination claim will not affect the fact that Mr. Behrens will be required to stand trial on the future employment prevention claim. In *Pelletier I*, the Ninth Circuit found that Mr. Pelletier had a clearly established right to pursue *in the future* his profession free from government interference even though the Court did not

reach the Pioneer Savings employment termination issue. *Pelletier I* did permit Mr. Behrens to move for summary judgment on the future employment issue; but *Johnson* now holds that a subsequent denial of such a summary judgment motion because of the existence of triable issues of fact is not immediately appealable. Since the District Court denied Mr. Behrens' motion for summary judgment because of such triable issues on the future employment claim, Mr. Behrens is required to stand trial on that issue regardless of the outcome of his attempt to secure a second interlocutory appeal sought in this Court.

Unlike *Mitchell* where a decision on the legal issue on appeal would determine whether the Attorney General would be required to stand trial, Mr. Behrens is required to stand trial regardless of the outcome of any second appeal. At best, a second interlocutory appeal could only reduce the scope of issues to be tried rather than eliminate the need for any trial.

In sum, the only way for Mr. Behrens to avoid trial is to receive yet a further interlocutory appeal on the future employment prevention claim, which even Mr. Behrens does not purport to seek by this appeal. Therefore, since Mr. Behrens cannot avoid trial, the rationale underpinning *Mitchell* simply does not exist to require Mr. Behrens to receive a second interlocutory review.

Similarly, the requirements in *Cohen* that the order appealed must be "effectively unreviewable" and "conclusively determine the disputed question" were found to be satisfied in *Mitchell* because a decision would conclusively resolve whether the Attorney General had to stand trial. In this case, though, Mr. Behrens must stand

trial in any event and even a reversal on his requested second appeal will not alter that result. Thus, any second appeal decision will not "conclusively determine" any immunity from trial but may merely resolve one of many legal issues involved in the action.

Because the fundamental goal of *Mitchell* and two of the three prongs of the *Cohen* test are missing in this case, Mr. Behrens should not be permitted a second interlocutory appeal. Moreover, those factors will never be satisfied when a second interlocutory appeal of qualified immunity is at issue.

A *second* interlocutory appeal assumes the existence of a prior *first* interlocutory appeal which the governmental defendant lost in the district and circuit courts. As a result, the first appeal already established that "certain given facts showed a violation of 'clearly established' law." *Mitchell* at 528. Moreover, a second appeal assumes that the district court has resolved a different but still "purely legal issue" not involving evidence sufficiency. For these conditions to have occurred, the governmental defendant of necessity will be required to stand trial on the previously decided issue regardless of the outcome of the second issue; and the second decision sought to be reviewed will not satisfy the *Cohen* three-prong test for finality because a trial will not be avoided.

The Brief of the "United States" attempts to create a hypothetical situation where the theory advanced by the plaintiff through the first interlocutory appeal somehow changes before the second appeal. Solicitor General's Brief at 21. Such certainly is not the case at bar nor indeed has it arisen in any reported decision. The argument

assumes that the plaintiff will voluntarily abandon a theory which he defended for years through the first interlocutory appeal. Such a hypothetical is not realistic and certainly not one which justifies permitting every governmental agent the right to multiple interlocutory appeals.

The Ninth Circuit's experience shows governmental defendants will in fact appeal at every opportunity presented regardless of the merits of such an appeal. See *Pelletier I* at P.A. 18a, citing and quoting *Schwartzman, supra* and also citing *Manhattan Beach Police Officers Ass'n, supra.*

A far more likely scenario is that a governmental defendant will attempt to recast the plaintiff's claim in order to seek a second bite of the interlocutory review apple. The defendant will assert that there has been some "subtle shift" in the plaintiff's theory when the plaintiff defends against a summary judgment motion. If the motion is denied, the governmental official will then notice an appeal, disrupting the docket in the District Court, delaying and exacerbating the proceedings and requiring motion practice to cause the appeal to be dismissed. This type of scenario is much more akin to the type of abuse of the interlocutory appeal process recognized by the three circuits which have already limited defendants to one such appeal.

The simple answer to the issue posed by the Solicitor General is to allow the governmental official to seek permission at the District Court level for a second interlocutory appeal should a legitimate need arise or seek review by writ proceeding should the request be denied.

Under this method, there is no trial delay unless and until a second interlocutory appeal is allowed.

In any event, the finality requirements of *Mitchell* and *Cohen* simply are not met in this case nor are they likely to be met in any case sufficiently to allow a second interlocutory appeal.

III. STRONG POLICY REASONS SUPPORT A SINGLE INTERLOCUTORY APPEAL RULE.

Mr. Behrens correctly notes that three circuits limit a governmental defendant to only *two* appeals from a denial of a claim for qualified immunity. One appeal is interlocutory and one appeal is from the final judgment should the defendant be unsuccessful at trial. Strong public policy reasons support this limitation and there are no fundamental reasons why multiple interlocutory appeals should be permitted. Of course, permitting a governmental defendant even one interlocutory appeal is one more appeal than the plaintiff receives.[13]

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[13] A plaintiff is not permitted to appeal interlocutory rulings limiting his theories. As a result, even a successful appeal by a governmental defendant requires a second appeal by the plaintiff from the final judgment of dismissal in order to review any district court rulings which limited the plaintiff's claims or theories.

This case presents such a situation in that a portion of Mr. Pelletier's Constitutional claims were dismissed because of an erroneous application of the statute of limitation. Mr. Pelletier was not entitled to appeal this interlocutory ruling and Mr. Behrens' appeal did not need to reach the issue. Had the Ninth Circuit not noted the error in passing and had the District Court not reversed itself, Mr. Behrens probably would have been

The Ninth Circuit's determination to impose a "One Interlocutory Appeal" rule was initially stated in *Pelletier I*. The reasoning, however, was restated in *Nelson v. Silverman*, 999 F.2d 417, 418 (9th Cir. 1993), as follows:

> The opportunity to appeal an adverse qualified immunity ruling in advance of trial serves the important purpose of preserving the role of the defense as "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815 (emphasis in original). However, these appeals also exact a price. The price consists principally of the additional expense and delay imposed on a civil rights plaintiff before his case can come to trial. In addition, such appeals interfere with the orderly progress of litigation through the trial courts and limit the ability of district judges to manage their own dockets. In *[Pelletier I]*, we reasoned that one appeal should be sufficient to resolve the legal issues pertinent to a claim of qualified immunity, and hence, that the price is worth paying once but not repeatedly.

See also *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460-461 (9th Cir. 1994).

The Seventh Circuit reached a similar conclusion in *Abel v. Miller*, 904 F.2d 394 (7th Cir. 1990). The Court of Appeals in *Abel* as did the Ninth Circuit in *Pelletier I* noted that the interlocutory appeal process is subject to abuse by governmental defendants, stating:

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required to stand two trials when the error was corrected on appeal from the final judgment.

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail. * * * A single pre-trial appeal is a sound accommodation of competing interests; multiple appeals are not.
>
> *Abel* at 396.

The First Circuit decision on the subject is found in *Kaiter v. Town of Boxford*, 836 F.2d 704, 707-708 (1st Cir. 1988). Both the Seventh and First Circuit opinions predate *Pelletier I*. Indeed, *Kaiter* predates Mr. Behrens' first appeal to the Ninth Circuit and was undoubtedly known by his Department of Justice trial and appellate lawyers when Mr. Behrens made the decision to prosecute an interlocutory appeal at that time.

The theory that the interlocutory appeal process may be used to strategically delay and thus potentially defeat Constitutional claims merely by excessive cost is evident in this case.

This action was commenced in February, 1989, and Mr. Behrens has successfully avoided trial through the present. At a time when the district courts are endeavoring to bring matters to trial within one year, this action is nearly seven years old and has yet to proceed through pre-trial conference.

This action was initially stayed in the District Court until the motion to dismiss could be decided. Discovery

was sought to be stayed in both the District Court and the Ninth Circuit pending the first appeal, which stay was fortunately denied. However, the action was stayed by the Ninth Circuit as the trial date approached and remained in that condition for nearly two years. The action was again stayed by Mr. Behrens' second appeal which stay was temporarily lifted only to be reinstated by this Court. Merely from the point of view of delay, the stays in this action have and will delay a resolution by at least 3 years.

Moreover, interlocutory appeals and resulting stays take an enormous toll, particularly on efforts to marshall evidence. Stays of discovery preclude a plaintiff from memorializing the facts necessary to prove his case at a time when memories are fresh. Stays on the eve of trial have an even more damaging aspect as potential trial witnesses may be lost. The alternative is to require a plaintiff to absorb the cost of video-taped depositions to insure that a jury will see "live" witnesses.

The interlocutory appeal process itself also is costly in that on each occasion numerous briefs and memoranda are required. This case has required briefing on seven different stay motions, three merits briefs, a rehearing brief, a certiorari brief and a merits brief in this Court and the case has not even gone through pre-trial. Clearly, another two year appeal process is expected from any jury determination in favor of Mr. Pelletier.

Further, there are no economic checks on the governmental briefing or motion practice normally found in most cases. As candidly admitted by the Solicitor General, federal governmental agents are usually represented

by governmental lawyers at public expense. The agents need not pay for the costs of defense but are still in a position to direct the defense or to complain when the government lawyer fails to follow the agent's instructions. No reason exists for a governmental agent to be cost effective or to limit motions to those which are believed to be meritorious. Government sponsored lawyers may be more worried about malpractice claims than sanction awards for frivolous appeals. On the other hand, plaintiffs (or their contingency fee counsel) must bear the costs of these protracted proceedings which usually are not recoverable.

Other litigants also suffer as a result of permitting multiple interlocutory appeals. As Mr. Behrens notes in his brief, governmental agents will always appeal on the eve of trial if permitted to do so. Such an appeal effectively mandates that the trial be continued, thus wasting the time set aside for trial and delaying all other cases on the docket.

Thus, from a pure cost/benefit analysis, a one interlocutory appeal rule is all that should be required.

Another abuse resulting from multiple interlocutory appeals is the likelihood that governmental defendants will stretch the time between appeals to insure that they receive a different circuit panel not involved with the first appeal. This type of forum shopping for inconsistent decisions should not be encouraged.

Moreover, providing multiple interlocutory appeals essentially demeans the decision-making ability of the district judges. For there to be a second interlocutory appeal, there must have been a first interlocutory appeal

where the decision to deny qualified immunity must have been affirmed. Since the lower court's decision has already been affirmed once, there is no reason to believe that the district judge suddenly will commit error during his second review. Since no reason exists for believing that the district judges will do less than their normal exemplary job on this issue, no reason exists to micro-manage their decisions by multiple appeals.

Mr. Behrens attempts to use statistics of his own creation to argue that district judges err more often on these issues. See Opening Brief at Pages 20-23. Mr. Behrens' "statistics" fail to take into account the numerous appeals which are dismissed or affirmed without published opinions. Indeed, the type of frivolous appeal of which the Ninth Circuit complained in *Pelletier I* is not likely to result in *any* published opinion and, thus, will not be found in Mr. Behrens' statistics. A more accurate analysis is to note the actual experience of the Circuits which has resulted in three Circuits limiting such interlocutory appeals to one.

Moreover, Mr. Behrens' statistical issue as framed is fallacious. The applicable issue should be the number of reversals occurring as a result of a *second* interlocutory appeal which Mr. Behrens claims is necessary to thwart abuse by the district judges. Since there appear to have been *no second interlocutory appeals* decided in the past, statistical sampling appears to offer no assistance to Mr. Behrens.

No compelling reason exists to require two interlocutory appeals but substantial reasons militate against two such appeals. The overwhelming costs and delay

resulting from such appeals need not be borne by a plaintiff who has already established a right to one triable claim.

The Ninth Circuit in *Pelletier I* gave the choice of timing of the interlocutory appeal to the governmental defendant. Clearly, this choice will be exercised when the defendant believes that he will have the best opportunity of overturning the decision of the district court and avoiding trial. The governmental defendant knows what acts he committed even if the plaintiff requires discovery. Thus, the defendant is in the best position to know whether his best chance is at the pleading stage or after summary judgment.

More importantly, the best check and balance for avoiding frivolous claims is at the District Court level, where judges can control the presentation of the issues to insure that the issue of qualified immunity is decided early on in the proceeding in a manner which causes the least disruption to the litigation process and the governmental defendant.

Mr. Behrens argues that qualified immunity issues should be resolved at the earliest opportunity. However, nothing in *Pelletier I* precludes early review. The early review in this case as in all cases is conducted by the trial court who has the ability to control the proceedings and protect against discovery abuses. The appellate review which is normally at the end of the case may be advanced by the governmental defendant to the very beginning should he believe that it is in his best interest to do so.

For overwhelming policy reasons, this Court should affirm the Ninth Circuits' reasoned One Interlocutory Appeal rule. It provides a fair balance of the interests

which are deserving of protection. However, governmental defendants such as Mr. Behrens have no legitimate interest in merely using the appellate process to effectively deny Mr. Pelletier the relief he is due.

CONCLUSION

When certiorari was sought by Mr. Behrens, this Court had not decided *Johnson, supra*. This Court now precludes appeals from the denial of summary judgment for qualified immunity if such denials are based upon evidence sufficiency. The District Court's order sought to be appealed found that triable issues of fact preclude summary judgment. In an effort to create a colorable "purely legal issue", Mr. Behrens has ignored the trial court order and has, instead, asserted as "given", facts which have been hotly disputed and which have not been decided in Mr. Behrens' favor by the District Court. Since it is clear that Mr. Behrens does not seek an appeal based upon the facts as presented by Mr. Pelletier, Mr. Behrens' attempted appeal is in violation of this Court's holding in *Johnson* and the Ninth Circuit was correct in determining an absence of jurisdiction.

Additionally, the second interlocutory appeal sought by Mr. Behrens is not from a "final" collateral order as required by *Mitchell, Cohen,* and *Johnson, supra*. The resolution of such an appeal will not alter the requirement that Mr. Behrens stand trial on the violation decided in *Pelletier I*. As a result of the first interlocutory appeal, the Ninth Circuit determined that one of the two alleged

violations of Mr. Pelletier's Constitutional rights committed by Mr. Behrens was indeed "clearly established" at the time of the violation. Mr. Behrens now demands a second interlocutory appeal to consider the portion of the first appeal which was not decided, i.e., whether the second violation alleged by Mr. Pelletier also involves a clearly established Constitutional right. If a trial must be held in any event, the denial of summary judgment by the district court is not "final" and no jurisdiction exists for an interlocutory appeal.

Finally, strong policy reasons support a One Interlocutory Appeal rule. Mr. Pelletier has waited nearly seven years for a trial on the merits of his claims. Four of those years have been spent in a prior interlocutory appeal.

Justice delayed is justice denied. Not all *Bivens* claims are frivolous. District judges are fully capable of eliminating frivolous claims without constant and multiple interlocutory appellate oversight. There is no legitimate purpose served by two interlocutory appeals particularly when a governmental defendant is then permitted to appeal from the final judgment. When the appellate process takes two years per appeal (a far more rapid appeal than found in the first interlocutory appeal in this case), the appeal process will consume six years before a deserving plaintiff is permitted to collect what is due.

The One Appeal Rule fashioned by the Ninth Circuit is a fair and reasonable accomodation to competing interests and one which follows the holding in *Mitchell*. It is

respectfully requested that the Ninth Circuits' dismissal be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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18 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE *JOHNSON* DECISION DOES NOT AFFECT THE APPEALABILITY OF THE DISTRICT COURT'S ORDER DENYING PETITIONER QUALIFIED IMMUNITY 2

A. Whether The Law Governing The Job-Termination Claims Was Clearly Established, And Whether Petitioner's Conduct Was Objectively Unreasonable, Are Appealable Immunity Issues 4

B. Even If *Johnson* Bars A Sufficiency Challenge On The Employment Interference Claims Under The Circumstances Of This Case, Whether Respondent's Facts Show Objectively Unreasonable Interference Is An Appealable Immunity Issue 8

II. EVEN IF *JOHNSON* REQUIRED THAT ONE SET OF *BIVENS* CLAIMS BE TRIED, THE DISTRICT COURT'S ORDER IS FINAL AND APPEALABLE AS TO THE OTHER *BIVENS* CLAIMS 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 7, 11

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 15

Connelly v. Comptroller of the Currency, 876 F.2d 1209 (5th Cir. 1989).....5, 6

Green v. Brantley, 941 F.2d 1146 (11th Cir. 1991) ..12, 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 6

Hunter v. Bryant, 502 U.S. 224 (1991)..... 5

Johnson v. Jones, 115 S.Ct. 2151 (1995) ..... *passim*

Jones v. Johnson, 26 F.3d 727 (7th Cir. 1994)..... 3

McLaurin v. Morton, 48 F.3d 944 (6th Cir. 1995)..... 13

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*

Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) 14

Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992) 14

Swint v. Chambers County Commission, 115 S.Ct. 1203 (1995)..... 10

Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747 (1986) 10

U.S. v. Gaubert, 499 U.S. 315 (1991) 7, 8

No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

This Court's recent ruling in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), does not dispose of this case, nor does it preclude the Ninth Circuit from asserting jurisdiction over and resolving any of the legal issues petitioner seeks to pursue on appeal relating to the denial of his qualified immunity defense. The only obstacle to petitioner's appeal is the Ninth Circuit's absolute jurisdictional bar against a second pretrial appeal in an immunity case, which the Court granted certiorari to review. The order of the Ninth Circuit dismissing petitioner's appeal solely on the ground that it is barred by the one-appeal rule should

be reversed and the case remanded for consideration of the merits of petitioner's qualified immunity defense.

I. THE *JOHNSON* DECISION DOES NOT AFFECT THE APPEALABILITY OF THE DISTRICT COURT'S ORDER DENYING PETITIONER QUALIFIED IMMUNITY

The district court in this case denied petitioner's motion for summary judgment on the ground of qualified immunity with a bare notation that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims." Pet. App. 5a. Respondent asserts that in view of the reference to unidentified fact issues, this case falls within the rule the Court announced last term, barring immediate appeal in immunity cases of orders which merely determine "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson v. Jones*, 115 S.Ct. at 2153. The *Johnson* analysis does not apply here because any genuine factual dispute that may exist in this case has no bearing on petitioner's entitlement to qualified immunity. Petitioner seeks to appeal the district court's order on the ground that no clearly established law afforded respondent the legal rights he claims were violated; and that facts in the record which are not disputed are fully adequate to support a qualified immunity determination.[1]

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[1] In his opposition to the petition for certiorari, filed some months before the *Johnson* decision, respondent asserted flatly that "in the instant case . . . the facts are not in dispute." Resp. Br. [in opposition to petition] at 13. The brief on the merits, filed after *Johnson*, features a lengthy catalog of purportedly disputed

In *Johnson*, respondent Jones claimed the three petitioning police officers beat him or stood by while others did so. The petitioners asserted they had done neither. That, however, was the sole dispute the case presented. All parties and the district court agreed that applicable law clearly forbade engaging in or permitting the kind of physical abuse Jones alleged. All parties and the court agreed also on how the law applied to the two sets of diametrically opposed factual allegations: no reasonable officer could have believed the conduct Jones described was legal. *Jones v. Johnson*, 26 F.3d 727, 727 (7th Cir. 1994). Consequently, Jones's version of events, if proved, would both establish liability and foreclose immunity; while the officers' version, if accepted by a jury, would both preclude liability and moot any immunity issue. The one question the district court decided was whether the record provided enough circumstantial support for Jones's side of the story to justify sending the disputed fact issue to a jury. *Johnson v. Jones*, 115 S.Ct. at 2153-54. The district court held that there was sufficient support.

The issue before the district court in *Johnson*, and the result, would have been exactly the same if the petitioners had been private parties and the word "immunity" had never been mentioned in the case. In that context, the Court declined to permit interlocutory appeal

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issues. Those "issues," however, are drawn from a factual summary that is virtually devoid of record citations and conflicts significantly with the facts and documentary evidence described by the Ninth Circuit in *Pelletier I*. *Compare* Resp. Br. at 2-7 and 21-24 *with* Pet. App. 11a-15a.

of an order which, "though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 2156.

In this case, liability and immunity are not, as they were in *Johnson*, literally two sides of the same coin. Petitioner sought summary judgment on respondent's *Bivens* claims on the ground that at the time in question, no clear law established that respondent had either a constitutionally protected property interest in his contingent employment with Pioneer Savings or, in the circumstances of this case, a protected liberty interest in his reputation; petitioner contended as well that even if the factual record is viewed in the light most favorable to respondent, petitioner could reasonably have believed his conduct, as described in the post-discovery record, was within the law. In short, petitioner's right to qualified immunity does not depend, as it did in *Johnson*, on whether the respondent can persuade a jury to accept respondent's version of any facts that may indeed be disputed.

A. Whether The Law Governing The Job-Termination Claims Was Clearly Established, And Whether Petitioner's Conduct Was Objectively Unreasonable, Are Appealable Immunity Issues

Respondent Pelletier's first set of *Bivens* claims rests initially on the theory that Pelletier had a constitutionally protected property interest in his position as Pioneer Savings' managing officer. Pelletier asserts that he was

deprived of that property interest without due process when the Pioneer board of directors fired him after receiving the May 1986 letter from Pioneer's supervisory agent, petitioner Behrens, declining to proceed with their application for approval of Pelletier's employment until federal savings and loan regulators had completed an investigation into the failure of a thrift where Pelletier had previously held a senior managerial position. If federal law in May 1986 did not clearly provide that Pelletier's employment had such constitutional protection that its termination required due process, Behrens is entitled to immunity regardless of whether a jury could properly find that Behrens' letter in fact infringed such a right. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Hunter v. Bryant*, 502 U.S. 224 (1991).

The facts necessary to establish immunity on the job-termination claims are few, firmly fixed in the record, and indisputable. Respondent Pelletier's position at Pioneer Savings was contingent on regulatory approval because the Federal Home Loan Bank Board had expressly required Pioneer to obtain approval of its managing officer as a condition of receiving federal insurance for its accounts. *Pelletier I*, Pet. App. 12a & n. 2 (setting out the text of Bank Board Resolution No. 84-164, March 29, 1984). Whether Pelletier knew of the condition, or questioned the Bank Board's right to impose it, or felt confident approval would be granted, is irrelevant to the immunity issue. The dispositive immunity question is whether in May 1986 settled law clearly recognized a constitutional property interest in private employment subject to regulatory approval. *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1212-14 (5th Cir. 1989). In fact,

the Ninth Circuit signaled strongly in *Pelletier I* that the answer is and must be negative: as of 1992, the court of appeals had "not yet had occasion to consider" the contingent employment issue. Pet. App. 21a.[2]

The district court erred when it concluded that some unidentified factual dispute precluded a finding of immunity on petitioner's motion for summary judgment, and petitioner seeks to correct that error on appeal. The Bank Board resolution that made the employment of any managing officer for Pioneer by definition conditional is indisputable fact. Whether federal law in 1986 clearly recognized that an individual whose employment is subject to such a contingency had a "basic, unquestioned constitutional right[]" to retain the position absent a due-process termination is a pure issue of law. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982); see *Connelly*, 876 F.2d at 1214 ("arguable" right is no basis for denying summary judgment on qualified immunity). The Ninth Circuit plainly had jurisdiction under *Mitchell v. Forsyth*

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[2] Nor could law clearly affording protection under such circumstances be found elsewhere in May of 1986. Three years after the Behrens letter, the Fifth Circuit found that an individual hired as a bank president had no clearly established property interest in the job he lost when the Comptroller's office, whose approval was required by federal regulation, decided he was unacceptable. The court of appeals observed, "To try to describe [such a] property interest is almost to refute the possibility that it was so clearly established as to abrogate the defendants' qualified immunity." *Connelly*, 876 F.2d at 1213. The Fifth Circuit noted also the "lack of authority in any comparable regulatory setting at the time" to support the banker's property argument. *Id.*

to review that issue before trial, absent the one-appeal rule petitioner challenges here.

While the absence of clearly established law alone provides ample basis for appellate jurisdiction, the objective reasonableness of petitioner Behrens' conduct is a second legal issue which in this case can be determined on appeal and resolved without considering any disputed factual allegations. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (reasonableness is an objective, though fact-specific, question of law to be resolved on summary judgment). The contents of the May 1986 letter that resulted in the termination of Pelletier's employment as managing officer are indisputable. *See* Pet. App. 13a.[3] The letter neither purports to fire Pelletier nor directs Pioneer to do so; it suggests that it "would be appropriate" for Pelletier to "step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills Savings is complete." Pet. App. 13a.

Undoubtedly, such a suggestion from Pioneer's supervisory agent carried what this Court in a similar context has called "the power of persuasion." *U.S. v. Gaubert*, 499 U.S. 315, 333 (1991). Under written Bank Board policy, however, "informal supervisory guidance" was an appropriate, and when possible a preferred, mode of effecting management changes. *Id.* at 330, citing Bank Board Resolution No. 82-381 (May 1982). As it confirmed in *Gaubert*, the Court "long ago recognized" that bank

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[3] Respondent admits in his complaint that the FSLIC investigation referenced in the May 1986 letter resulted, some six months later, in a suit by FSLIC against Pelletier. JA:11-12.

and thrift regulators may properly use informal persuasion before, or in lieu of, resort to the statutory enforcement or removal procedures Pelletier asserts were necessary in view of the protected property interest he claims. *Id.* at 329-30, 333. In that context, it requires no sorting of disputed facts to determine whether a reasonable supervisory agent could have believed it was legal to recommend to Pioneer that it replace, at least temporarily, a managing officer who was being investigated by FSLIC in connection with the failure of a similar institution.[4] *Johnson* does not prohibit the Ninth Circuit from reviewing the district court's implicit legal finding on that issue. The sole bar is the one-appeal rule.

B. Even If *Johnson* Bars A Sufficiency Challenge On The Employment Interference Claims Under The Circumstances Of This Case, Whether Respondent's Facts Show Objectively Unreasonable Interference Is An Appealable Immunity Issue

Respondent Pelletier's second set of *Bivens* claims involves allegations that petitioner Behrens interfered with Pelletier's search for substitute employment after he left Pioneer. On Behrens' first interlocutory appeal, the Ninth Circuit acknowledged a clearly established right on Pelletier's part to pursue his chosen profession free of

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[4] The fact that respondent Pelletier "has been utterly unsuccessful in causing Mr. Behrens' termination letter to be either withdrawn or retracted by . . . the appropriate federal agencies" (Resp. Br. at 6) clearly indicates the reasonableness of petitioner's belief that his course of action was completely in accordance with accepted regulatory policy and procedures.

government interference. Pet. App. 23a. Pelletier asserts that because the appellate court has already reviewed the question of clearly established law in the context of the interference claims, the only basis for challenging the district court's order with respect to those claims is insufficiency of the evidence – a nonappealable issue under *Johnson*.

Petitioner respectfully submits that the *Johnson* rule may not foreclose review of an evidence-sufficiency question when it is raised, as it would be here, on an appeal that also presents pure questions of immunity law. More importantly, however, petitioner sought in the district court, and seeks to pursue on appeal, a determination on the legal, non-evidentiary issue of whether the activities respondent characterizes as "interference," under the circumstances respondent himself describes, were objectively reasonable as a matter of law.

Petitioner does believe that the district court erred in finding a genuine issue for trial on the claims that Behrens interfered with Pelletier's efforts to find substitute employment in the savings and loan industry. After full discovery, the facts on which Pelletier bases his interference claims are simply an extrapolation from the May 1986 letter that provides the basis for the job-termination causes of action. Pelletier admits that the post-discovery record contains nothing in addition to the letter except (i) Pelletier's testimony that he himself disclosed the letter to prospective employers who inquired about his departure from Pioneer; and (ii) his assertion that it is "customary in the industry to orally 'clear' a senior officer candidate with the 'regulators' " – not Behrens, but other regulatory personnel who, he contends, would have

known about the letter. Resp. Br. at 6. In short, the facts have not expanded beyond the "vague assumptions about informal communications within an industry" that *Pelletier I* warned could not survive summary judgment. Pet. App. 22a. The district court was clearly wrong in denying petitioner's motion; but the *Johnson* rule does not require trial of the interference claims for two reasons.

First, the Court in *Johnson* expressly left open the possibility that a court of appeals, reviewing pure immunity issues such as those raised in connection with the job-termination claims in this case, might properly exercise pendent jurisdiction over a sufficiency of the evidence question as well. *Johnson*, 115 S.Ct. at 2159; *but cf. Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995). If appellate jurisdiction over pendent claims is ever permissible, it is appropriate here, where the plainly appealable job-termination claims and the related employment-interference claims are legally intertwined. *See, e.g., Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 755-57 (1986) (approving appellate review of nonappealable issue closely related to appealable issue).

Further, the court of appeals may review and rule on the objective reasonableness of Behrens' conduct – a legal issue which was not considered on the prior appeal because the appellate court expressly assumed that either discovery would flesh out the nebulous interference theories or the claims would be dismissed on summary judgment. Pet. App. 22a. Neither occurred, however: despite the respondent's failure to adduce any additional "interference" facts through discovery, the district court denied summary judgment on immunity. At a minimum, Behrens is now entitled to an objective reasonableness ruling

based on the completed pretrial record. The court of appeals may make the determination by assuming that Behrens did exactly what Pelletier claims: distributed the May 1986 letter to other regulatory personnel, who in turn might be contacted by prospective employers informally checking Pelletier's credentials. Resp. Br. at 6. Whether a supervisory agent could reasonably have believed that it was legal to route copies of the Pioneer letter to other regulators, notwithstanding Pelletier's clear right to seek other employment in the regulated area, is a legal determination properly reviewed on interlocutory appeal. *Anderson v. Creighton*, 483 U.S. at 639; *Mitchell v. Forsyth*, 472 U.S. at 528.

The ruling in *Johnson* does not affect the court of appeals' ability to review the district court's order denying petitioner Behrens' request for immunity with respect to either Pelletier's job-termination or his employment-interference claims. But for the one-appeal rule, the Ninth Circuit plainly has jurisdiction over the issues raised by petitioner's appeal.

II. EVEN IF *JOHNSON* REQUIRED THAT ONE SET OF *BIVENS* CLAIMS BE TRIED, THE DISTRICT COURT'S ORDER IS FINAL AND APPEALABLE AS TO THE OTHER *BIVENS* CLAIMS

Respondent asserts that if *Johnson* bars an appeal of the interference-with-future-employment claims, it also destroys appellate jurisdiction over the job-termination claims. His theory appears to be that an interlocutory appeal on qualified immunity is permitted under *Mitchell* only when the appeal, if successful, would end the case

completely: if trial is necessary on one *Bivens* claim, the district court's order denying immunity is not final with respect to any *Bivens* claim. Resp. Br. at 24-32.

Both respondent's premise and his conclusion are faulty. As previously discussed, petitioner's appeal raises non-evidentiary immunity issues with respect to the interference claims as well as the job-termination claims. The Ninth Circuit has appellate jurisdiction over each set of claims, in its own right or via pendent appellate jurisdiction, and may reverse the district court's denial of immunity as to both. Thus, it is simply not true that the interference claims have been irrevocably consigned to trial. In any event, neither case law nor the policy enunciated in *Mitchell* requires that a defendant forfeit his trial immunity on one *Bivens* claim merely because another must be resolved by a jury.

The Eleventh Circuit considered this precise issue in an *en banc* opinion and resolved it in favor of the interlocutory appeal right. *Green v. Brantley*, 941 F.2d 1146 (11th Cir. 1991). The plaintiff in *Green* asserted that the defendant FAA officials deprived him of a property right without due process when they revoked his flight instructor's license, and of a liberty interest in his reputation when they allegedly released stigmatizing information about him. The district court denied qualified immunity on both sets of claims. The defendants appealed only the former. Like respondent here, the *Green* plaintiff argued that because the liberty-interest claims would go to trial in any event, there was no appellate jurisdiction over the property-interest claims even if the denial of immunity was erroneous as to that cause of action. *Id.* at 1147-48. The appellate panel agreed.

Rehearing the case *en banc*, the Eleventh Circuit noted that at least nine courts of appeals have held that a civil rights defendant is entitled to an immediate appeal of an order denying immunity on damages claims even when the defendant must face trial in his official capacity on related claims for injunctive relief. *Id.* at 1149 & n.4. It found that the practical and policy considerations recognized in those cases apply as well when the still-pending claims are damages claims against the individual, because the purpose of immunity is " 'to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.' " *Id.* at 1149, *quoting Siegert v. Gilley*, 500 U.S. at 232. The court of appeals concluded:

> If we refused to permit government officials to appeal immediately the denial of qualified immunity when they still face some claim for personal liability damages, we would destroy the right of those officials to be free from the burdens of litigation on those claims from which they are properly immune. In a practical sense, refusing to hear appeals such as this one would effectively abolish qualified immunity for those defendants, clearly frustrating both *Mitchell* and *Harlow* by forcing government officials to litigate claims from which they are immune simply because other claims will proceed to trial regardless. . . . Nothing in *Mitchell* or *Harlow* says that a defendant has a right to qualified immunity only if the plaintiff does not allege other claims from which the defendant has no immunity.

Id. at 1150-51 (citation omitted); *accord McLaurin v. Morton*, 48 F.3d 944, 949 (6th Cir. 1995) (defendant is entitled

to pretrial immunity appeal on fourteenth amendment *Bivens* claim even though eighth amendment claim will be tried); *Musso v. Hourigan*, 836 F.2d 736, 741-42 & n.1 (2d Cir. 1988) (fact that a first amendment *Bivens* claim may have to go to trial does not preclude appeal of related fourth amendment *Bivens* claim); *but see Schrob v. Catterson*, 967 F.2d 929, 939-42 (3d Cir. 1992) (denial of Westfall Act substitution is not immediately appealable if *Bivens* claims remain to be tried).

The reasoning of the Eleventh, Sixth and Second Circuits is consistent with collateral order principles generally, and with the specific purpose of the qualified immunity doctrine. One benefit Congress and the judiciary have sought to achieve by fashioning pretrial review rights is to "simplify, or more appropriately direct, the future course of litigation," and thereby "reduce the burdens of future proceedings" even if those burdens are not eliminated entirely. *Johnson v. Jones*, 115 S.Ct. at 2154. That consideration weighs particularly heavily when the entitlement the appellant seeks to protect is by definition a right to avoid not just trial but "the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. at 526. As the Eleventh Circuit observed, "the pain and suffering that the public official and his family endures while the suit is pending . . . can constantly grind away at the official, seriously impeding the official in the performance of his duties." *Green v. Brantley*, 941 F.2d at 1150. Minimizing that kind of distraction and professional impairment is the fundamental reason for the qualified immunity shield, and permitting review of orders that dispose of less than all claims against the defendant furthers that purpose. *Id.*

It is the one-appeal rule, not *Johnson v. Jones*, that prevents the court of appeals from reviewing the legal immunity issues the district court either decided erroneously or failed to address on petitioner's motion for summary judgment. A single-appeal restriction conflicts with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Mitchell v. Forsyth*, 472 U.S. 511. The economy and efficiency arguments respondent urges in its support do not outweigh the importance, to public officials and to government processes, of fully enforceable qualified immunity protection. Nor is there a compelling practical need for a rigid limitation in view of the curb imposed by *Johnson*, and the appellate courts' ability to control and sanction genuinely improper appeals under rules and procedures keyed to specific abuses.

CONCLUSION

The order of the Ninth Circuit dismissing petitioner's appeal should be reversed and the case remanded for consideration of the merits of the appeal.

Respectfully submitted,

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September, 1995

(5)

No. 94-1244

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals correctly employed a one-interlocutory-appeal rule to bar a government official's second interlocutory appeal where the second appeal involved a legally based qualified immunity defense to a claim that was not before the court of appeals at the time of the first appeal.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	12
Argument	13
I. Petitioner's second appeal raised a purely legal qualified immunity question appropriate for interlocutory review under *Johnson* v. *Jones*	13
II. The one-interlocutory-appeal rule should be rejected	17
A. The one-appeal rule is contrary to *Cohen* v. *Beneficial Indus. Loan Corp.* and *Mitchell* v. *Forsyth*	17
B. A practical need for a one-appeal rule has not been demonstrated	22
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Abel v. *Miller*, 904 F.2d 394 (7th Cir. 1990)	19, 23, 24, 26
Anderson v. *Creighton*, 483 U.S. 635 (1987)	22
Apostol v. *Gallion*, 870 F.2d 1335 (7th Cir. 1989)	27
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	1
Chuman v. *Wright*, 960 F.2d 104 (9th Cir. 1992)	27
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)	8, 12, 17
Connelly v. *Comptroller*, 876 F.2d 1209 (5th Cir. 1989)	7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	17
DeVargas v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), cert. denied, 498 U.S. 1074 (1991)	24
English v. *Dyke*, 23 F.3d 1086 (6th Cir. 1994)	25
No. 93CV1118 (D. Conn. Nov. 11, 1993)	
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	8, 9

Cases—Continued: Page

Johnson v. *Jones*, 115 S. Ct. 2151 (1995) 12, 13, 15, 16, 17, 18, 24, 25
Kaiter v. *Town of Boxford*, 836 F.2d 704 (1st Cir. 1988) 19, 20, 23, 24
Kennedy v. *City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 24
Kulwicki v. *Dawson*, 969 F.2d 1454 (3d Cir. 1992) 24
Marshall v. *Kleppe*, 637 F.2d 1217 (9th Cir. 1980) 10
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) .. 1, 7, 8, 12, 13, 17, 18
Murphy v. *Morris*, 849 F.2d 1101 (8th Cir. 1988) 24
Nelson v. *Silverman*, 999 F.2d 417 (9th Cir. 1993) 11, 23
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 22
Perry v. *Sindermann*, 408 U.S. 593 (1972) 14
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) 17
Richardson v. *United States*, 468 U.S. 317 (1984) 27
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 6
Sinclair v. *Schriber*, 834 F.2d 103 (6th Cir. 1987) 25
Stewart v. *Donges*, 915 F.2d 572 (10th Cir. 1990) 27
White v. *OPM*, 787 F.2d 660 (D.C. Cir.), cert. denied, 479 U.S. 885 (1986) 7
Yates v. *City of Cleveland*, 941 F.2d 444 (6th Cir. 1991) . 27

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I 21
Amend. V 6
Adminstrative Procedure Act, 5 U.S.C. *et seq.* 6
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 3
Privacy Act of 1974, 5 U.S.C. 552 *et seq.* 6
12 U.S.C. 1421-1449..... 3
12 U.S.C. 1423 3
12 U.S.C. 1424 3
12 U.S.C. 1426 3
12 U.S.C. 1432(a) 3

Statutes, regulations and rules—Continued: Page

12 U.S.C. 1437 3
12 U.S.C. 1437(a) 4
12 U.S.C. 1437(b) 3
12 U.S.C. 1464 3
12 U.S.C. 1725 3
12 U.S.C. 1725(a) 3
28 U.S.C. 1291 17
12 C.F.R. (1986):
Section 500.32 4
Section 501.10 4
Sections 562.1-562.10 4
Section 571.6 4
Section 571.6(b) 4
Fed. R. App. P:
Rule 27 26
Rule 38 23
Rule 47 26
Fed. R. Civ. P. 56(f) 25

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns whether a government official is categorically limited to one interlocutory appeal to assert qualified immunity defenses under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), even where the second appeal concerns a legal issue that was not, and could not have been, considered in the first appeal. Federal employees sued under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), often seek interlocutory review of district court decisions denying them qualified immunity. The United States has a strong interest in pre-

serving its employees' abilities to perform their functions free from meritless litigation. The United States also has a strong interest in ensuring effective deterrence of, and remedies for, unconstitutional conduct by government employees. Both of those interests will be directly affected by the resolution of the issue presented by this case.

STATEMENT

Respondent Robert J. Pelletier, a former bank executive, sued petitioner John W. Behrens, an agent of the Federal Home Loan Bank Board (FHLBB), to challenge actions petitioner took in the course of monitoring compliance with banking regulations in the early years of the federal savings and loan crisis. In 1985, respondent was named managing officer of Pioneer Savings & Loan Association (Pioneer), pending federal regulatory approval of his service in that capacity. When Pioneer sought such approval from the FHLBB, however, petitioner recommended that Pioneer find someone else to serve as managing officer until the completion of an investigation involving respondent's actions as an officer at another savings and loan that had been placed in receivership.

Respondent contends that petitioner's recommendation caused him to be fired by Pioneer, thus depriving him of a constitutionally protected property interest in employment without procedural due process. Respondent also contends that petitioner conspired to deprive him of a constitutionally protected liberty interest in future employment in the banking industry. Petitioner asserts qualified immunity against both those claims. The defense was denied as to the conspiracy claim in an earlier appeal. The issue before this Court is the validity of a rule

preventing petitioner from appealing the denial of qualified immunity as to the job-termination claim.

1. The Federal Home Loan Bank Act of 1932 established the Federal Home Loan Bank system to restore public confidence in thrift institutions and to make sound and economical home mortgage loans more widely available. See 12 U.S.C. 1421-1449. The Act established the FHLBB, an agency of the federal government, and placed it at the head of a new system of twelve regional Home Loan Banks. 12 U.S.C. 1423, 1437(b).[1] Each of the regional Home Loan Banks was owned and controlled by its members, which were the eligible savings institutions within its geographic district, and served primarily as a central reserve credit source for those member institutions. 12 U.S.C. 1424, 1426. In 1934, Congress created the Federal Savings and Loan Insurance Corporation (FSLIC), a separate federal agency chartered to insure deposits at savings institutions. 12 U.S.C. 1725. The FHLBB had authority to regulate the Home Loan Banks, 12 U.S.C. 1432(a), 1437, and their member savings institutions, 12 U.S.C. 1464. The FHLBB also functioned as the operating head of the FSLIC. 12 U.S.C. 1725(a). The FHLBB carried out certain of its functions through individual officers and employees of the regional Home Loan Banks, who, although otherwise private bank employees, were denominated FHLBB and FSLIC "Supervisory Agents" (or, in the case of the Presidents of the Home

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[1] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, has since abolished both the FHLBB and the FSLIC. This description of the statutory and regulatory scheme thus refers to pre-FIRREA law.

Loan Banks, "Principal Supervisory Agents") and acted for those purposes as agents of the federal government. 12 U.S.C. 1437(a); 12 C.F.R. 500.32, 501.10 (1986).

In 1983, in response to the developing savings and loan crisis, the FHLBB promulgated regulations requiring especially close scrutiny of all new savings institutions (referred to as "de novo" institutions) that applied to the FSLIC for insurance of their accounts. 12 C.F.R. 571.6 (1986); see also 12 C.F.R. 562.1-562.10 (1986). Savings institutions seeking FSLIC insurance could not be approved if their "financial policies or management [were] unsafe," 12 C.F.R. 571.6(b), and could also be rejected if the "character of the management" was questionable, *ibid.*

2. On March 29, 1984, South Coast Savings & Loan Association (South Coast), a de novo institution, received FHLBB approval for insurance of its accounts. Pet. App. 11a. One of the conditions of that approval was that South Coast provide for employment of a qualified full-time executive managing officer, and that "the continuation or succession of competent management will * * * be subject to the Principal Supervisory Agent's approval." *Id.* at 11a-12a & n.2. In early 1985, South Coast was succeeded in interest by Pioneer, another de novo institution, and Pioneer named respondent as its managing officer, subject to FHLBB approval. *Id.* at 12a.

Petitioner, a salaried employee of the Federal Home Loan Bank of San Francisco, served as a designated FHLBB and FSLIC Supervisory Agent in the Eleventh District. Pet. App. 13a n.4. In April, 1986, petitioner took over the South Coast/Pioneer file from another Supervisory Agent. Pioneer had

requested approval of respondent as managing officer, but petitioner informed Pioneer that the FHLBB could not process its request because respondent had previously been employed as a loan officer and head of the Beverly Hills Savings & Loan Association's Major Loan Division, and a FSLIC investigation had disclosed possible wrongdoing at that institution. *Id.* at 13a. By letter dated May 8, 1986, petitioner told Pioneer's board of directors that the FHLBB could not proceed with Pioneer's application until the Beverly Hills investigation was complete. The letter stated:

> This is in response to the application by Pioneer Savings, requesting approval for Mr. Robert Pelletier to become managing officer of the association. We wish to advise you that an inquiry is currently being conducted by the Federal Savings and Loan Insurance Corporation (FSLIC) into the failure of Beverly Hills Savings and Loan Association, and because of Mr. Pelletier's previous employment with that institution this office is unable at this time to proceed with the application until that inquiry is complete. In this regard, we believe it would be appropriate if Mr. Pelletier would step aside from the management of the association at this time and until such time as the investigation into the failure of Beverly Hills savings is complete.
>
> In view of the foregoing, we believe it is imperative that the Board of Directors initiate a search for a new managing officer without delay. We ask that you keep this office advised as to your progress in that regard.

Ibid. The day that Pioneer received that letter, it asked respondent to step down as President and, when he refused, Pioneer fired him. *Id.* at 14a. Respondent has been unable to find similar employment in the savings and loan industry. *Ibid.*

3. On February 23, 1989, respondent filed a complaint in United States District Court for the Central District of California naming petitioner as defendant in two Fifth Amendment *Bivens* claims. First, he alleged that, in sending the May 8, 1986, letter, petitioner denied him his due process right to a hearing regarding allegations of respondent's wrongdoing. Second, he alleged that petitioner violated substantive due process by impairing his property and liberty rights to employment in his chosen profession. Pet. App. 14a; Complaint ¶¶ 29-39 (first and second claims).[2] Petitioner moved to dismiss or, in the alternative, for summary judgment, asserting that the claims were time-barred by a one-year statute of limitations, and that he was entitled to qualified immunity because neither claim was based on clearly established law.[3]

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[2] In claims not at issue here, respondent also sued the Federal Home Loan Bank of San Francisco, the FHLBB and the United States, alleging violations of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the Privacy Act of 1974, 5 U.S.C. 552 *et seq.*, and also presenting common-law tort claims of tortious interference with contract, intentional and negligent infliction of emotional distress, and negligence. He named petitioner as a defendant in the tort claims, but the United States was substituted as defendant under the Westfall Act. See Pet. App. 11a, 33a.

[3] Petitioner also relied on *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988), asserting that the comprehensive regulation of the banking industry was a "special factor" counseling against

The district court applied a one-year statute of limitations and granted the motion to dismiss "to the extent [that the *Bivens*] claims are based on the [May 8, 1986, letter] and/or plaintiff's loss of employment with Pioneer Savings & Loan," but denied the motion "to the extent said claims are based on other alleged subsequent acts of defendants preventing and continuing to prevent plaintiff from securing employment." 10/5/89 Order at 2-3. The court commented that, "given the status of discovery herein"—which had not yet taken place—"it is premature for the court to consider [petitioner's] motion for summary judgment," and thus denied it without prejudice. *Id.* at 2, 4. The court's order did not explicitly address the qualified immunity defenses.

4. On March 2, 1990, petitioner took an interlocutory appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), asserting qualified immunity on the *Bivens* claims to the extent that they were not time-barred. Petitioner contended that, in view of decisions such as *Connelly* v. *Comptroller*, 876 F.2d 1209 (5th Cir. 1989), and *White* v. *OPM*, 787 F.2d 660, 663 (D.C. Cir.), cert. denied, 479 U.S. 885 (1986), respondent had no clearly established liberty interest in pursuing work in his chosen profession, and that the conspiracy claim thus must fail. Behrens 3/2/90 C.A. Br. 42. Petitioner also asserted that his conduct in sending a confidential letter declining to approve respondent for the managing officer position did not

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judicial creation of a *Bivens* remedy in this context. Pet. App. 14a, 19a-20a. The district court rejected that defense, the court of appeals declined to exercise pendent appellate jurisdiction to review it, *id.* at 19a-20a, and it is not relevant here.

violate any clearly established property or liberty interest. *Id.* at 39-40.[4]

On June 29, 1992, the court of appeals affirmed in pertinent part. Pet. App. 10a-33a.[5] The court rejected respondent's contention that the court lacked jurisdiction to entertain an interlocutory appeal from an order denying a motion to dismiss on qualified immunity grounds. *Id.* at 17a. The court observed that a denial of qualified immunity is a final, appealable order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), "regardless of whether that denial takes the form of a refusal to grant a defendant's motion to dismiss or a denial of summary judgment." Pet. App. 17a. Because *Mitchell* v. *Forsyth*, 472 U.S. at 526, and *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982), require that claims of qualified immunity be resolved at the earliest possible stage of the proceedings, the court of appeals concluded that "[a] requirement that official defendants answer wholly meritless claims for relief or adduce facts to refute entirely unsubstantiated

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[4] Petitioner noted that, although the statute of limitations issue was not before the court of appeals, "there is Ninth Circuit precedent casting some doubt on the limitations ruling below." Behrens 3/2/90 C.A. Br. 45 n.18 (citing cases).

[5] The decision was delayed because, after the appeal was submitted, the court of appeals noted that it was unclear from the district court's order whether the district court had ruled on a separate question, also subject to interlocutory appeal, regarding the propriety of the substitution of the United States as defendant in the common-law tort claims. The court of appeals thus initially vacated the submission and remanded to allow the district court to enter an order in that regard. See Br. in Opp. App. 1a-2a. The case was then resubmitted for decision. Pet. App. 16a.

allegations would run counter to the Court's express direction." Pet. App. 17a.

In the course of its opinion, the court of appeals, in dictum, announced a one-appeal rule for qualified immunity cases. Pet. App. 18a-19a. The court observed that routine appeals from denials of qualified immunity at both the motion to dismiss and motion for summary judgment stages would impose on *Bivens* plaintiffs considerable burdens of expense and delay. *Id.* at 18a. Thus, a defendant official

> may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain. We do not think that a rule limiting defendants to one bite at the apple will be "peculiarly disruptive of effective government."

Id. at 19a (quoting *Harlow*, 457 U.S. at 817). The court observed that a defendant official accordingly may appeal immediately from an order denying a motion to dismiss on qualified immunity grounds only "at his peril," because, if he does so unsuccessfully, he is barred from appealing any later order denying qualified immunity. Pet. App. 19a.

On the merits of the qualified immunity defense, the court of appeals concluded that, in view of the district court's statute of limitations ruling, "the question whether [respondent] had a cognizable liberty or property interest in the particular position that he held at Pioneer is not before us." Pet. App.

21a.[6] The court thus addressed only whether respondent had alleged a violation of a clearly established right to be free from ongoing governmental interference with his pursuit of his chosen livelihood, and held that he had. *Id.* at 21a-24a. The court held that respondent's allegations that several senior-level jobs were offered him, only to be withdrawn when the prospective employers learned of petitioner's May 8, 1986, letter and of respondent's termination from Pioneer, and that he had been unable to secure other employment in the savings and loan and financial institutions industries, were "sufficient to support the claim that [petitioner] violated [respondent's] clearly established right to pursue his chosen profession free from interference by the government." *Id.* at 23a. On September 24, 1993, the panel denied rehearing.

5. On remand to the district court, the parties agreed that the *Bivens* claim earlier dismissed as time-barred could be revived. The parties conducted substantial discovery on both claims. Petitioner then moved for summary judgment on a variety of grounds, including an argument that the revived *Bivens* claim was based on unclear law and therefore barred by qualified immunity. Behrens 3/18/94 D. Ct. Br. 12-15. Petitioner noted that, although the court of appeals had not reached the question on the first appeal, it had signaled the unsettled nature of the law governing the job-termination claim when it stated in dictum

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[6] The court noted, however, that the district court's imposition of a one-year limitations period "appears contrary to the rule established by our holding in *Marshall* v. *Kleppe*, 637 F.2d 1217, 1223-1224 (9th Cir. 1980)," applying a longer statute of limitations to *Bivens* claims. Pet. App. 15a n.6.

that it had "not yet had occasion to consider whether a requirement of regulatory approval suffices to negate entirely the constitutional protection to which a privately employed individual would otherwise be entitled." Behrens 3/18/94 D. Ct. Br. 14; see Pet. App. 21a.

On September 7, 1994, the district court entered an order ruling on a series of pending motions, including the summary judgment motion. Pet. App. 2a-7a. The court held that "[p]laintiff's *Bivens* claims should be reinstated as against defendant Behrens, since the applicable statute of limitations is three, rather than one, year," *id.* at 3a, and that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims," *id.* at 5a. Once again, the district court did not explicitly address the qualified immunity defense, but effectively denied it by ordering that the "[m]otion by defendant Behrens for summary judgment is denied as to the Bivens claims." *Id.* at 6a.

On October 24, 1994, petitioner filed a notice of appeal, stating his intention to challenge the one-interlocutory appeal rule and to assert qualified immunity. In response to an application by respondent, the district court certified the second interlocutory appeal as frivolous "[i]n light of the 'one appeal' rule." Pet. App. 9a. Respondent moved to dismiss the appeal for want of appellate jurisdiction, and the court of appeals granted the motion based on the one-appeal rule. *Id.* at 1a (citing *Nelson* v. *Silverman*, 999 F.2d 417 (9th Cir. 1993) (applying one-appeal rule to bar second interlocutory qualified immunity appeal)).

SUMMARY OF ARGUMENT

1. But for the one-interlocutory-appeal rule, the court of appeals would have had jurisdiction over the second appeal in this case notwithstanding that the district court's order denying petitioner's motion for summary judgment asserting qualified immunity stated that "material issues of fact remain." This Court thus need not remand for reconsideration in light of *Johnson* v. *Jones*, 115 S. Ct. 2151 (1995). Petitioner sought in his second appeal to assert precisely the kind of "purely legal" qualified immunity defense that *Johnson* held is properly appealable. The district court's order thus mischaracterized the issue as one turning on disputed facts. That mischaracterization is clear from the record, and should not be permitted to defeat an otherwise valid appeal.

2. This Court should reject the court of appeals' categorical one-interlocutory-appeal rule. There is a small class of cases—including this one—in which a second appeal would address a qualified immunity defense that is legally distinct from the defense raised in the first appeal, and that could not have been raised in that appeal. The courts of appeals have jurisdiction over second appeals in such circumstances, and the Ninth Circuit's one-appeal rule barring such appeals thus conflicts with *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Johnson* v. *Jones*, *supra*. Although no more than one appeal is and should be the norm in qualified immunity cases, this case illustrates why the court of appeals' rule is too rigid and should be rejected.

The practical need for a one-appeal rule is also questionable. The circuits that have adopted such

rules have done so based on a judgment that multiple appeals impose burdens of expense and delay on civil rights plaintiffs that outweigh the benefits to public officials seeking to enforce their qualified immunity defenses under *Mitchell* v. *Forsyth*, *supra*. Yet, in practice, very few qualified immunity cases actually involve second appeals, and even fewer second appeals can be expected after this Court's recent decision in *Johnson* v. *Jones*, *supra*. More flexible, case-specific techniques of docket management are available and adequate to ensure that unwarranted second appeals are quickly identified and disposed of, while meritorious second appeals are allowed to proceed.

ARGUMENT

I. PETITIONER'S SECOND APPEAL RAISED A PURELY LEGAL QUALIFIED IMMUNITY QUESTION APPROPRIATE FOR INTERLOCUTORY REVIEW UNDER *JOHNSON* V. *JONES*

The court of appeals had jurisdiction over the second interlocutory appeal in this case, and only the one-appeal rule prevented the court from exercising it. The question on which petitioner sought to appeal was precisely the type of qualified immunity issue that this Court has held is subject to interlocutory appellate review: whether "certain given facts showed a violation of 'clearly established' law." *Johnson* v. *Jones*, 115 S. Ct. 2151, 2155 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985)). Specifically, petitioner's second appeal would have addressed respondent's claims that he had a constitutionally protected property interest in his employment as managing officer of Pioneer Savings

& Loan, and that petitioner deprived him of that interest without procedural due process by sending the May 8, 1986, letter declining to approve respondent for that position. The "given facts" upon which the qualified immunity defense to that claim rests are that, under federal regulations generally governing new savings institutions as well as a Federal Home Loan Bank Board resolution directed specifically at Pioneer, respondent had no right to serve as managing officer of Pioneer without regulatory approval.

Petitioner asserted in the district court, and sought to pursue on appeal, the purely legal qualified immunity defense that the law is, at best, unclear as to whether an employee can have a property right in a job that, by law, is conditioned on regulatory approval. A property interest cannot arise from "a mere subjective 'expectancy,'" but requires a "legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Perry* v. *Sindermann*, 408 U.S. 593, 602-603 (1972). Petitioner sought to contend that, in a context such as this one, where employment in a particular position is expressly conditioned from the outset on regulatory approval, no "claim of entitlement" to the job, and thus no clearly established procedural due process right, exists. Whether petitioner is correct as to that pure question of law is an issue over which, in the absence of a one-appeal rule, the court of appeals had interlocutory appellate jurisdiction.[7]

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[7] The factual disputes that respondent identified below are not material to whether petitioner is entitled to qualified immunity. For example, respondent alleged in his declaration in district court:

The wording of the district court's order might, however, be viewed as an independent obstacle to interlocutory appellate review in light of *Johnson* v. *Jones*, *supra*. The district court denied the motion for summary judgment, in which petitioner raised his qualified immunity defense, by stating, without further explanation, that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claims." Pet. App. 5a. The order appears on its face to "resolve[] a *fact*-related dispute about the pretrial record, namely whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson*, 115 S. Ct. at 2153. *Johnson* held that "defendants cannot immediately appeal this kind of fact-related district court determination." *Ibid.* Among the defenses petitioner has raised in this case, however, is a qualified immunity defense that does not turn on the resolution of any factual disputes. Indeed, respondent himself asserted in his brief in opposition to the petition for certiorari that, in this case, "the facts are not in dispute." Resp. Br. 13.

> I was told in April 1986, one month before the 'Behrens Directive,' that the federal regulators were not pursuing me and that they would not jeopardize my employment until the Beverly Hills Savings investigation had been completed and I had been found liable for some wrongdoing. I was told this by both Ralph Christie and Ann Sobel, senior attorneys for the Bank Board.

Pelletier Decl. (6/12/89) at 3 (¶ 7). Petitioner is entitled on appeal to argue that, even assuming that a jury would credit that allegation, the law was at best unclear whether, under those circumstances, respondent could have a property right in the managing officer position. That argument is a purely legal one, not contingent on resolution of any disputed issues of fact.

In the presence of a district court order rejecting petitioner's qualified immunity defense with a one-sentence reference to "[m]aterial issues of fact," petitioner's effort to pursue on appeal a purely legal qualified immunity defense presents a problem closely related to one the *Johnson* Court addressed. The Court there noted the possibility that "[d]istrict judges may simply deny summary judgment motions without indicating their reasons for doing so," thus leaving unspecified what set of facts should be taken as true in answering the purely legal question about clearly established law. 115 S. Ct. at 2159. In that situation, the Court acknowledged, "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed." *Ibid.* The Court thus sought to ensure that terse district court orders not insulate otherwise-appealable qualified immunity questions from interlocutory review. This case gives the Court the opportunity to ensure that a district court decision not lead to the same result by stating as a summary conclusion, without justification in the record, that "material issues of fact remain" precluding a decision regarding qualified immunity. Although the court of appeals did not have an opportunity to address the potential applicability of *Johnson* here, that court is in no better position than is this Court to do so now. Because this case properly would have been in the court of appeals but for the one-appeal rule, this Court should review the decision to adopt that rule.

II. THE ONE-INTERLOCUTORY-APPEAL RULE SHOULD BE REJECTED

A. The one-appeal rule is contrary to *Cohen* v. *Beneficial Indus. Loan Corp.* and *Mitchell* v. *Forsyth*

A categorical one-appeal rule is inconsistent with the final-order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), as it applies to qualified immunity claims under *Mitchell* and *Johnson*. A court of appeals that has jurisdiction under 28 U.S.C. 1291, as *Cohen* interpreted that statute, lacks the authority to fashion a rule that contracts its own jurisdiction. Because the one-appeal rule contracts that jurisdiction in some situations, it is invalid.

A trial-court order is appealable under the *Cohen* test if it "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." *Johnson*, 115 S. Ct. at 2155 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993), quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). See *Cohen*, 337 U.S. at 546. *Mitchell* held that the three parts of the *Cohen* test are satisfied by interlocutory orders denying qualified immunity defenses. 472 U.S. at 525-528.

Qualified immunity orders "easily meet[]" the first part, because such immunity not only protects defendant officials from liability for damages, but is also an "immunity from suit." *Id.* at 526-527. When there is "nothing in the subsequent course of the proceeding in the district court that can alter the court's conclusion that the defendant is not immune,"

denial of qualified immunity "finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Ibid.* An order denying qualified immunity also meets the second part of *Cohen*: "[A] claim of immunity is conceptually distinct from the merits of the plaintiff's claim," *ibid.*, because it addresses "the purely legal issue what law was 'clearly established,'" that "can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson*, 115 S. Ct at 2156 (quoting *Mitchell*, 472 U.S. at 530). Finally, a denial of qualified immunity is "effectively unreviewable" after final judgment because, to the extent that the immunity protects a right not to stand trial, that right is irrevocably lost once trial takes place. *Mitchell*, 472 U.S. at 525-526.

The court of appeals viewed its one-appeal rule as consistent with *Mitchell* because "[i]f the defendant's entitlement to qualified immunity is truly ascertainable as a matter of law * * * that fact should not require more than one judiciously timed appeal," and because a defendant official "may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected." Pet. App. 19a. That reasoning, however, does not support application of a one-appeal rule in this case. Instead, it reflects the court of appeals' erroneous assumption that a qualified immunity defense to the job-termination claim that was the subject of petitioner's 1994 appeal would present the same legal question raised by the qualified immunity defense to the post-termination conspiracy claim. If a second appeal is sought on the same theory that a court of appeals has already rejected in an earlier appeal, that could indeed

warrant dismissal of the second appeal as frivolous under the doctrine of law in this case. But the risk of such abuse of the appellate process does not justify the adoption of a categorical one-appeal rule to bar a valid and legally distinct second appeal.

The First Circuit in *Kaiter* v. *Town of Boxford*, 836 F.2d 704 (1988), also sought to derive support for its announcement of a one-appeal rule from *Mitchell* and *Cohen*.[8] *Kaiter* held that the first part of *Cohen*, requiring a conclusive determination, is not met where steps remain to be taken "in the subsequent course of the proceedings [in the district court] that can alter the court's conclusion that the defendant is not immune." *Id.* at 707. *Kaiter* involved retaliation claims against a local building inspector who appealed from an order denying him absolute immunity, but who told the court of appeals that, if his appeal failed, he would assert qualified immunity in a subsequent motion for summary judgment. *Id.* at 705-706. The court of appeals held that defendant's decision "reserving for a later *pretrial* proceeding his claim to qualified immunity" was "fatal to his current appeal." *Id.* at 706. The court viewed absolute and qualified immunity as two aspects of a single doctrine aimed at shielding public officials from interference with their duties, and concluded that one pretrial appeal—but only one—is needed to make that shield effective. *Id.* at 707. A defendant official may bring all his immunity defenses in a motion to dismiss and appeal

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[8] The Seventh Circuit in *Abel*, 904 F.2d at 396, implicitly acknowledged that its one-appeal rule might be contrary to *Mitchell*, and instead relied primarily on the burden that appeals "on the authority of *Mitchell*" would impose on plaintiffs. See page 23, *infra*.

immediately if that motion is denied, but if separate motions to dismiss and for summary judgment are planned, "both motions should be resolved prior to any interlocutory appeal," because the court "will not entertain an interlocutory appeal on one of the claims while the other is reserved for later pretrial proceedings." *Id.* at 708.

Kaiter's justification of the one-appeal rule under *Cohen* and *Mitchell* fails to take account of special circumstances, not present in *Kaiter*, that are present in this case. This case involves two separate claims based on different legal theories. Those different legal theories call for separate and different immunity defenses, only one of which could be adjudicated in the initial, 1990 interlocutory appeal because, at that time, the other claim had been dismissed as time-barred. In addition, in this case, unlike *Kaiter*, the fact that petitioner would have reason to assert a second immunity defense in later proceedings in the district court (and on appeal) was not evident when he took his first appeal. The need for a second appeal to address whether that separate claim was based on clearly established law became apparent only after the timeliness of that claim was reconsidered in 1994 and the claim was revived by the district court. In sum, *Kaiter*'s finality analysis, although perhaps applicable to the facts of that case, would not have justified applying a one-appeal rule to postpone and consolidate the first appeal in this case with the second one, because no further immunity proceedings in the district court were anticipated with respect to either claim at the time of that first appeal. And the second appeal in this case was proper under *Cohen* and *Mitchell* because it dealt with a conclusive determination of a qualified immunity

question that could not have been decided in the first appeal.

Circumstances like these, although rare, are not *sui generis*. Rather, this case is illustrative of the narrow class of cases in which second interlocutory appeals are warranted and should be permitted. In addition to the circumstances presented in this case, a second appeal may be needed—and be available consistent with *Cohen*—when, under liberal pleading and amendment rules, plaintiffs shift legal theories substantially during litigation, thus making different qualified immunity defenses appropriate.

For example, suppose that a prisoner alleges that she was subjected to retaliatory discipline in violation of the First Amendment. The defendant warden then moves to dismiss on the ground that the plaintiff admitted in her complaint that she violated prison rules and, the warden asserts, the law is unclear as to whether a retaliation claim will lie where the violation triggering the allegedly retaliatory discipline actually did take place. Assume that the district court might deny such a qualified immunity motion, and that the court of appeals affirms. The case then proceeds to discovery. If discovery were to reveal no evidentiary basis for the retaliation claim, but did support a claim that the discipline was imposed without prior notice and a hearing, the prisoner might recast her claim as a due process violation. If the law supporting that *revised* claim were to be unclear, there is no principle consistent with the *Cohen/Mitchell* analysis on which the defendant warden should be denied an opportunity to raise a qualified immunity defense and, if necessary, to appeal its denial before trial. Like the case now before the court, this example involves (1) two

separate and distinct legal claims of qualified immunity, and (2) circumstances in which the defendant would not anticipate, at the time of the first appeal, that a second appeal would be needed. Where those factors are present, two appeals are warranted under *Cohen*. A categorical one-appeal rule therefore should be rejected.[9]

B. A practical need for a one-appeal rule has not been demonstrated

1. *Defendant officials rarely take multiple appeals.* The principal rationale for a one-appeal rule is that multiple interlocutory appeals would add

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[9] A one-appeal rule may also be inappropriate in cases involving an immunity defense (absolute or qualified) that is susceptible of disposition on the pleadings alone, coupled with a potential qualified-immunity defense (to the same or a separate claim) the viability of which is contingent on the results of discovery. Denial of a motion to dismiss based on absolute immunity is immediately appealable under *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), just as denial of such a motion based on qualified immunity is immediately appealable under *Mitchell*, and such appeals should be promptly taken consistent with the principle that immunity questions generally "should be resolved at the earliest possible stage of a litigation." *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987). A second immunity defense, however, may not be "ripe" until some discovery is had. *Ibid.* ("discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved"). Application of a one-appeal rule in such a situation could require that appeal on the first immunity issue be delayed until discovery is complete. Yet, if an immediate pre-discovery appeal could obviate the need for further litigation on at least one claim (or perhaps the whole case), a requirement that the defendant official wait because of the uncertain prospect that a second appeal might be needed would weaken the very immunity protection that *Harlow* and *Mitchell* sought to provide.

substantially to the delay and expense of litigating civil rights claims. See Pet. App. 18a. The Ninth Circuit in *Nelson* v. *Silverman*, 999 F.2d 417, 419 (1993), explained that "[i]t was precisely to shield plaintiffs from repeatedly having to shoulder [the burdens of appellate litigation] that we concluded in *Pelletier* that a defendant may bring only one pre-trial appeal of the denial of a grant of qualified immunity." The Seventh Circuit in *Abel* v. *Miller*, 904 F.2d 394, 396 (1990), similarly cautioned:

> Unless courts of appeals are careful, appeals on the authority of *Mitchell* could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off the trial. A sequence of pre-trial appeals not only delays the resolution but increases the plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail.

See also *Kaiter*, 836 F.2d at 707 ("there is no need to burden the appellate system and prolong the pretrial process with multiple interlocutory appeals").[10]

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[10] A related reason the courts have cited for a one-appeal rule is to deprive defendant officials of "potent weapons for delay." *Abel*, 904 F.2d at 397; see Pet. App. 18a (routine, baseless qualified immunity appeals "evince[] a flagrant disregard of the Court's intent in creating the qualified immunity doctrine"). It cannot, however, simply be assumed that officials interpose baseless second interlocutory appeals for improper purposes. When there is reason to believe in a particular case that a defendant official has done so, the court may, after giving notice and an opportunity to respond, impose sanctions under Federal Rule of Appellate Procedure 38. Such targeted sanctions, rather than wholesale elimination of the opportunity for valid as well as baseless second appeals, is the

Multiple qualified immunity appeals are not, in practice, common, however, and they are likely to become even less frequent in light of *Johnson* v. *Jones*, *supra*. The circuits that have adopted one-appeal rules have themselves acknowledged that there are very few cases in which defendant officials have actually used opportunities to take repeated appeals. See *Abel*, 904 F.2d at 396 ("Paucity of precedent on this question [of the permissibility of second appeals] must reflect the forbearance of public officials rather than the lack of opportunity."); *Kaiter*, 836 F.2d at 706 ("[I]n every case we have found which permitted interlocutory review of an immunity ruling, the defendant's entire claim to immunity was raised in a single proceeding"). Indeed, none of the cases cited in the petition as allowing multiple appeals in fact involved more than one appeal. See Pet. 8.[11]

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appropriate response to abuses. See *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 (10th Cir. 1988) ("That some interlocutory appeals may be frivolous * * * does not affect whether we have jurisdiction. Those appellants or their counsel can be sanctioned for taking a frivolous appeal.").

[11] *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1457 n.2, 1460 n.5 (3d Cir. 1992), involved neither qualified immunity nor any issue of repeated appeals, but a routine exercise of jurisdiction over an absolute immunity appeal, with the court observing that *Mitchell* contemplated immunity appeals at "either or both" the motion to dismiss or motion for summary judgment stage. *Murphy* v. *Morris*, 849 F.2d 1101, 1103-1104 (8th Cir. 1988), rejected the contention that a one-appeal rule required the defendant official to delay an initial appeal asserting absolute immunity until her qualified immunity defense was also rejected and ripe for appeal. *Kennedy* v. *City of Cleveland*, 797 F.2d 297, 299-300 (6th Cir. 1986), affirmed a district court's denial of supplemental motions for summary judgment

Not only have there been very few reported cases involving multiple appeals, but this Court's decision last Term in *Johnson* promises to restrict further the class of cases in which a second appeal is potentially available. Several circuits before *Johnson* permitted appeals to assert "evidence insufficiency" claims, see 115 S. Ct. at 2154 (citing cases), and those claims were natural candidates for second appeals following courts of appeals' initial rejections of qualified immunity defenses at the motion to dismiss stage. In eliminating the opportunity for appeals asserting evidentiary insufficiency, *Johnson* substantially diminished the bases for concern about both routine second appeals and multiple, fact-oriented

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asserting qualified immunity on the ground that the issues they raised had already been considered. In its discussion of the importance of the courts' managerial powers over qualified immunity cases, the court observed that civil rights actions "may be interrupted by not one but two interlocutory appeals" asserting qualified immunity. *English* v. *Dyke*, 23 F.3d 1086 (6th Cir. 1994), reversed an order holding that failure to raise a qualified immunity defense in a motion to dismiss waived it, and reiterated *Kennedy*'s statement that a qualified immunity defense can be raised (and, if denied, appealed) at various stages of litigation. *Sinclair* v. *Schriber*, 834 F.2d 103 (6th Cir. 1987), held that denial of a motion for summary judgment on qualified immunity grounds without prejudice under Federal Rule of Civil Procedure 56(f) is not appealable, notwithstanding *Kennedy*'s apparent tolerance of repeated appeals, because such an order lacks the requisite finality under *Cohen*.

Moreover, two of the four cases (see Pet. 8) imposing a one-appeal limitation (this case and *Kaiter*) did so before any second appeal was filed, and another case did not involve a full-fledged initial appeal, but only a notice of appeal that the official withdrew. Only *Abel* actually reached the stage of a second appeal on a qualified immunity question.

appeals.[12] After *Johnson*, very few cases remain plausible candidates for a second interlocutory appeal.

2. *Other procedures better serve the same purpose.* The federal courts have sufficient tools at their disposal, without a one-appeal rule, to manage the potential burdens created by unjustified multiple interlocutory qualified immunity appeals. Appellees who believe that a second appeal is unwarranted—for example, because it is barred by the law of the case as announced in an earlier appeal, or because it is a fact-bound appeal barred by *Johnson*—may move to dismiss an appeal before briefing on the merits is had. See Fed. R. App. P. 27. The filing and disposition of such a motion will generally occur sooner and impose less burden on the litigants and the courts than full briefing and decision on the merits. Alternatively, the appellate courts might use their rulemaking powers, see Fed. R. App. P. 47, to require that appellants seeking to take second appeals first move for leave to do so. Although no court of appeals to our knowledge has yet adopted such a procedure, such a rule might encourage greater reflection and restraint on the part of the potential appellant, and would ensure that the court of appeals has an early opportunity to consider whether the issue sought to

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[12] Counsel for petitioner in *Johnson* conceded that "theoretically it would be possible in every case" for a public official to appeal the denial of a motion for summary judgment on grounds of "evidentiary sufficiency." Oral Arg. Tr. 7-8. And one concern prompting the one-appeal rule was that a defendant official "could continue indefinitely" in a process of adducing additional evidence, moving repeatedly for summary judgment on an enlarged record, and appealing each denial. *Abel*, 904 F.2d at 396.

be raised actually falls within the narrow class of permissible second appeals.

Existing rules in several circuits authorize district courts to certify to the court of appeals that a qualified immunity appeal is frivolous. See, *e.g.*, *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (Easterbrook, J.) (district court may certify in writing that immunity appeal is frivolous); *Yates* v. *City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991) (accord); *Stewart* v. *Donges*, 915 F.2d 572, 576-577 (10th Cir. 1990) (accord); *Chuman* v. *Wright*, 960 F.2d 104-105 (9th Cir. 1992) (accord). That procedure (which was used in this case) minimizes disruption at the trial level by allowing the district court to retain jurisdiction and to require the parties to continue with the district court proceedings while the appeal is pending. It also may facilitate summary dispositions of baseless appeals by communicating to the court of appeals the strength of the district court's conviction that its order was correct or not appealable. And, as this Court has pointed out, frivolous interlocutory appeals "may be weeded out by summary procedures." *Richardson* v. *United States*, 468 U.S. 317, 322 (1984). In order to ameliorate potentially prejudicial delays caused by multiple appeals, courts can also expedite them, so that obvious district court errors can promptly be corrected by summary reversal.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration of the merits of petitioner's qualified immunity defense.

Respectfully submitted.

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No. 94-1244

In The

Supreme Court of the United States

October Term, 1995

JOHN W. BEHRENS,

Petitioner,

v.

ROBERT J. PELLETIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 3

LIMITING PUBLIC OFFICIALS TO ONE PRE-TRIAL APPEAL OF DECISIONS DENYING QUALIFIED IMMUNITY IS INCONSISTENT WITH THE CENTRAL PURPOSE OF THE DOCTRINE OF QUALIFIED IMMUNITY 3

A. To Minimize the Adverse Consequences of Lawsuits Against Public Officials, Questions of Qualified Immunity Must Be Resolved Before Public Officials Are Subjected to Trial or Burdensome Pre-Trial Proceedings..... 6

B. Under the Ninth Circuit's Rule, Public Officials Lose an Essential Protection Afforded By Qualified Immunity Because They Will Be Forced to Endure Discovery and Other Pre-Trial Proceedings Rather Than Risk "Wasting" Their One Appeal On a Rejected Motion to Dismiss 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 6

Butz v. Economou, 438 U.S. 478 (1978) 3, 4, 6

Davis v. Scherer, 468 U.S. 183 (1984) 7

Halperin v. Kissinger, 606 F.2d 1192 (D.C.Cir. 1979) 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..... *passim*

Hunter v. Bryant, 502 U.S. 224 (1991) 2

Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151 (1995) ..9, 13

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*

Pelletier v. Fed. Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) 9, 12

Siegert v. Gilley, 500 U.S. 226 (1991) 8, 10, 11

Wyatt v. Cole, 504 U.S. 158 (1992) 7

STATUTES

42 U.S.C. Section 1983 1

OTHER AUTHORITIES

Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct.Rev. 281 3

Coffey, *Waiving Local Government Immunity in North Carolina*, 27 Wake Forest L. Rev. 709 (Fall, 1992) 4

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37.5, amicus curiae City and County of San Francisco, joined by the 60 California cities and towns identified below ("the cities"), submits this brief in support of petitioner John W. Behrens.[1] The City and County of San Francisco is a municipal corporation operating under a Charter adopted pursuant to the California Constitution, article XI, section three.

This case involves the right of a public official who is entitled to qualified immunity in a civil rights action not to be subject to burdensome discovery, other pre-trial proceedings and trial. The cities have a direct interest in the resolution of the question before the Court. Each city is subject to lawsuits arising under 42 U.S.C. §1983, alleging that the cities, their officers or employees violated an individual's constitutional rights. When city officers and employees are targeted as individual defendants in such lawsuits, the cities often assert the defense of qualified immunity.

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[1] The following California public entities join in this brief: the cities of Alameda, Anaheim, Bakersfield, Carlsbad, Cathedral City, Cerritos, Culver City, Del Rey Oaks, Dinuba, Eureka, Exeter, Farmerville, Galt, Greenfield, Huron, Huntington Beach, Indio, King City, Lafayette, Lemon Grove, Lindsay, Los Angeles, Lynwood, Malibu, Manteca, Marina, Monterey, Monterey Park, Needles, Oakland, Orange Cove, Orinda, Palm Desert, Piedmont, Pleasanton, Porterville, Redding, Redlands, Riverside, San Bruno, San Diego, San Jacinto, San Pablo, Santa Ana, Santa Rosa, Santee, South El Monte, Sunnyvale, Susanville, Thousand Oaks, Tracy, Tulare, Vacaville, Vernon, Visalia, Walnut Creek, West Sacramento, West Hollywood, Woodlake, and the Town of Los Gatos.

Each of the cities is within the jurisdiction of the Ninth Circuit Court of Appeals, and is therefore subject to that Court's decision in this case. Under that decision, public officials claiming qualified immunity are prevented from filing an interlocutory appeal of more than one order of the district court denying that claim.

SUMMARY OF ARGUMENT

The Ninth Circuit's limitation on appeals involving claims of qualified immunity directly conflicts with the purpose behind the doctrine. This Court's decisions "repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage of litigation," (*Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citations omitted)), so that qualified immunity will shield public officials from being subjected to burdensome pre-trial proceedings including discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 817 (1982). The inevitable effect of the Ninth Circuit's one-appeal limitation, however, is that public officials will have to submit to burdensome pre-trial discovery because they will be forced to wait until the late stages of litigation to appeal a decision denying qualified immunity.

ARGUMENT

LIMITING PUBLIC OFFICIALS TO ONE PRE-TRIAL APPEAL OF DECISIONS DENYING QUALIFIED IMMUNITY IS INCONSISTENT WITH THE CENTRAL PURPOSE OF THE DOCTRINE OF QUALIFIED IMMUNITY.

In *Butz v. Economou*, 438 U.S. 478 (1978), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court refined the doctrine of qualified immunity and its applicability to public officials. Much of the debate in *Butz* and *Harlow* addressed the question of whether high-ranking public officials should be absolutely immune from suit, or whether they should have the more limited protection of qualified immunity. This Court recognized that denying absolute immunity to a public official has significant social costs:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." [Citations omitted.]

Harlow, 457 U.S. at 814.[2]

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[2] For a thorough discussion of the social costs inherent in limiting governmental officials' immunity defenses, *see* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public*

Despite these costs, a majority of the members of the Court held in *Harlow* and *Butz* that qualified, not absolute, immunity was appropriate. The Court was careful to explain that qualified immunity provided public officials with sufficient protection because "insubstantial suits need not proceed to trial" given the availability of motions to dismiss and motions for summary judgment. *Harlow*, 457 U.S. at 807-808, 814; *Butz*, 438 U.S. at 507-508.

Thus, the Court intended that qualified immunity would serve to protect public officials from the burdens of trial and pre-trial proceedings, including "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 817. The Court found these burdens to be "peculiarly disruptive of effective government."[3]

Officials for Damages, 1980 S.Ct.Rev. 281, 324-327, cited with approval in *Harlow*, 457 U.S. at 814, n.22; *see also*, Coffey, *Waiving Local Government Immunity in North Carolina*,' 27 Wake Forest L. Rev. 709, 714 (Fall, 1992) (noting that a "second major catalyst to insurers dropping municipal liability coverage [in the 1980's] was the utter explosion of civil rights claims against local governments.").

[3] In *Harlow*, the Court cited with approval Judge Gesell's eloquent discussion of the burdens public officials face when made the frequent target of lawsuits:

> We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court recognized that the protections afforded public officials under *Harlow* would be lost unless public officials were able to file interlocutory appeals of trial court decisions denying qualified immunity. The Court held that qualified immunity shared an "essential attribute" with absolute immunity: each is "an entitlement not to stand trial under certain circumstances." 472 U.S. at 525. "The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable." *Id.* at 537 (O'Connor, J. and Burger, C.J., concurring).

Thus, the modern doctrine of qualified immunity arose out of a debate over whether certain public officials should even be subject to suit. In determining that qualified immunity struck the appropriate balance between protecting individual rights and the adverse consequences inherent in denying officials absolute immunity, the Court endorsed pre-trial procedures – including interlocutory appeals – designed to resolve the issue of qualified immunity before public officials would be subject to trial or burdensome pre-trial proceedings. *See Mitchell*, 472 U.S. at 524-530. The Ninth Circuit's one-appeal rule

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> government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. . . . The effect of this development upon the willingness of individuals to serve their country is obvious.

Harlow, 457 U.S. at 817, n.29, *quoting, Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C.Cir. 1979) (Gesell, J., concurring).

significantly alters this balance. For these reasons, the Court should reverse the decision below.

A. To Minimize the Adverse Consequences of Lawsuits Against Public Officials, Questions of Qualified Immunity Must Be Resolved Before Public Officials Are Subjected to Trial or Burdensome Pre-Trial Proceedings.

In *Butz* and *Harlow*, this Court stated its expectation that courts would quickly resolve issues of qualified immunity through motions to dismiss and motions for summary judgment. *Butz*, 438 U.S. at 507-508; *Harlow*, 457 U.S. at 808. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court instructed that "qualified immunity questions should be resolved at the earliest possible stage of a litigation," and advocated the following procedure:

> Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is *entitled to dismissal prior to discovery.* [Citation omitted.] If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's *motion for summary judgment* on qualified immunity grounds can be resolved.

Anderson, 483 U.S. at 646, n.6 (emphasis added).

This Court has repeatedly explained that early resolution of qualified immunity is necessary to minimize the

social costs associated with subjecting public officials to lawsuits arising out of the performance of their duties:

> Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

Mitchell, 472 U.S. at 526, *quoting*, *Harlow*, 457 U.S. at 817; *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."); *Anderson*, 483 U.S. at 638 ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (describing the balance the doctrine of qualified immunity strikes between "the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.")

Thus, when a public official is faced with a complaint that does not state a claim for violation of a clearly established constitutional right, that official can file a motion to dismiss. *See Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."). In addition, if a plaintiff has stated a claim sufficient to withstand a motion to dismiss, a public

official is still protected from some of the burdens associated with pre-trial procedures and trial because the official can file a motion for summary judgment. *Id.* ("Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.").

At either of these stages, *Mitchell* permits the public official to file an interlocutory appeal. *Id.* at 527 ("[A] defendant's motion for dismissal or summary judgment . . . easily meets [the] requirements [for an appealable interlocutory decision]."); *see Siegert v. Gilley*, 500 U.S. 226 (1991) (appeal following denial of motion to dismiss) and *Hunter*, 502 U.S. 224 (appeal following denial of motion for summary judgment).

Nothing in this Court's decisions on qualified immunity supports the proposition that a public official waives his right to appeal the denial of a summary judgment motion if earlier he exercised his right to appeal the denial of a motion to dismiss. In fact, the practical consequence of the one-appeal rule is that public officials will lose much of the protection that qualified immunity is meant to afford.

B. Under the Ninth Circuit's Rule, Public Officials Lose an Essential Protection Afforded By Qualified Immunity Because They Will Be Forced to Endure Discovery and Other Pre-Trial Proceedings Rather Than Risk "Wasting" Their One Appeal On a Rejected Motion to Dismiss.

In *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992), the Ninth Circuit established its one-appeal rule. The court expressed its annoyance with having to address a large number of appeals on qualified immunity that, the court perceived, were filed as delaying tactics. 968 F.2d at 870. Rather than establishing a procedure for eliminating non-meritorious appeals, the court summarily imposed its one-appeal rule. The incongruity between this new rule and the problem it is meant to address is highlighted by the following passage from the court's decision:

> For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his favor [citation omitted], he also may not demand repeated appellate consideration of a claim of qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain.

Id. at 870-871.

This reasoning is fundamentally flawed. In *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151 (1995), this Court explained that interlocutory appeals under *Mitchell* are meant to resolve "purely legal matters," not factual disputes. The reasons for this limitation on interlocutory

appeals are obvious: "Institutionally speaking, appellate judges enjoy no comparative expertise" relative to trial courts in resolving factual disputes. 115 S.Ct. at 2157. Consequently, interlocutory appeals of fact-based questions "are less likely to bring important error-correcting benefits . . . than where purely legal matters are at issue." *Id.* at 2158.

In no way do "the same reasons" support the one-appeal rule. "Purely legal matters" can be presented through appeals of orders denying both motions to dismiss and motions for summary judgment. A motion to dismiss can show that, as a matter of law, the facts stated in a complaint do not allege the violation of a clearly established right. A summary judgment motion based on undisputed facts following discovery can show that a public official's conduct did not, as a matter of law, violate any clearly established right. Thus, "institutionally speaking," the one-appeal rule has no merit.

Moreover, the one-appeal rule poses an obvious dilemma for those whom qualified immunity is meant to protect. If a public official is limited to one appeal of a denial of qualified immunity, the official naturally will wait until the late stages of litigation to appeal. In most cases it would not be worth the risk to appeal at the pleading stage and forfeit the right to appeal a later adverse summary judgment ruling. But to postpone an appeal is to forfeit much of the protection of qualified immunity.

This Court's decision in *Siegert v. Gilley*, 500 U.S. 226 (1991), is illustrative. In *Siegert*, a public official, Gilley,

filed a motion to dismiss which claimed he was entitled to qualified immunity. Gilley argued that the facts the plaintiff alleged did not state a claim for deprivation of a liberty interest without due process of law. When the district court denied Gilley's motion to dismiss. Gilley filed an interlocutory appeal and prevailed.

Gilley followed the course consistent with the purpose behind qualified immunity; he filed his appeal at the earliest possible stage of litigation. *Anderson,* 483 U.S. at 646, n.6. Of course, Gilley could have proceeded with discovery following denial of this motion to dismiss and then raised qualified immunity again in a motion for summary judgment. If the district court denied that motion, Gilley could have filed an interlocutory appeal. But had Gilley delayed his appeal, he would have lost the protection against "such pretrial matters as discovery" that are "peculiarly disruptive of effective government." *Mitchell,* 472 U.S. at 526.

Had Gilley's case arisen in the Ninth Circuit, he would have taken a significant gamble by filing his appeal following the denial of his motion to dismiss. Although this Court vindicated Gilley's position, it was by no means clear that an appellate court would hold that Siegert's complaint failed to state a claim for deprivation of a liberty interest. The district court and three Justices of this Court believed that the complaint *did* state a claim. *See Gilley,* 500 U.S. at 235 (Kennedy, J., concurring) ("As revealed by the differences in our majority and dissenting opinions, the question . . . [is] of some difficulty.").

Thus, in the Ninth Circuit, the prudent course for Gilley to have followed would have been to suffer the

"burdens of litigation" and then file a motion for summary judgment. As this Court's decisions show, these burdens can be significant. *See, e.g., Mitchell,* 472 U.S. at 515 ("Discovery and related preliminary proceedings dragged on for the next five-and-a-half years" and included deposition of Attorney General); and *Harlow,* 457 U.S. at 805 (involving "eight years of discovery").

The one-appeal rule is intended to serve two purposes; neither is sufficient to overcome the countervailing benefits of early resolution of qualified immunity claims. First, the rule is meant to limit the caseloads carried by appellate courts. In *Mitchell,* however, this Court found that the goal of reducing dockets does not justify restricting a public official's right to resolve qualified immunity through an interlocutory appeal. 472 U.S. at 518 (reversing decision that was based on fear "that allowing piecemeal appeals of such issues would unduly burden appellate courts").

Second, the one-appeal rule is intended to avoid pretrial delay. *See Pelletier,* 968 F.2d at 870 (criticizing the use of interlocutory appeals as "delaying tactics"). Of course, interlocutory appeals do not result in delay if they are successful. Moreover, if a public official files an unsuccessful appeal following denial of a motion to dismiss, and if the official may not file an appeal following a denial of a motion for summary judgment, that official will have to stand trial. The trial court's resources are conserved if an error can be corrected through an interlocutory appeal.

This Court has recently recognized this point:

> Of course, sometimes interlocutory appellate review has important countervailing benefits. In certain cases, it may avoid injustice by quickly correcting a trial court's error. It can simplify, or more appropriately direct, the future course of litigation. And, it can thereby reduce the burdens of future proceedings, perhaps freeing a party from those burdens entirely.

Johnson v. Jones, 115 S.Ct. at 2154. In addition, this Court in *Mitchell* rejected the dissenters' argument that the benefits of interlocutory appeals are outweighed by the dangers of giving "government officials a potent weapon to use against plaintiffs, delaying litigation endlessly. . . . " *Mitchell*, 472 U.S. at 556 (Brennan, J., dissenting).

Finally, to the extent defendants abuse the right to file interlocutory appeals, the logical way for the courts to respond is to target that abuse. This Court attempted to do just that in *Johnson*. In fact, the effect of the *Johnson* decision will undoubtedly be to ease the burden on appellate courts by eliminating many qualified immunity appeals that focus on the resolution of factual disputes. Unlike this Court's approach in *Johnson*, the one-appeal rule precludes appeals without regard to their merit.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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